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IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; DONALD T. VAUGHN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of State Correctional Institution at Rockview; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY,
Petitioners,

v.

BRIAN THOMAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Brian Thomas killed a woman named Linda Johnson by forcing a crutch through her vagina and into her chest. He was convicted of first degree murder by a Philadelphia jury in 1986, and was subsequently sentenced to death after the jury was told that he had previously been convicted of trespass and an "indecent assault" on a toddler. The Third Circuit found that Thomas was prejudiced by the absence of mitigating evidence at his sentencing hearing, even though the missing evidence would have revealed to the jury, among other things, that Thomas once attacked five police horses by forcing a broomstick into their rectums (killing one of them) and that he had molested a second toddler.

1. Did Thomas demonstrate that he was prejudiced by the absence of supposedly mitigating evidence, where that evidence actually would have portrayed him as a sadistic menace, where he refused to allow any mitigation evidence, and even though none of this supposedly favorable evidence has even been subject to a hearing or cross-examination?

2. Did the Third Circuit unlawfully fail to apply the deference standard, where both the Pennsylvania Supreme Court and the state trial court rejected Thomas' ineffectiveness claim on the merits?

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ORDERS AND OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Third Circuit dated July 1, 2009, affirming the order of the district court but remanding for a hearing on the extent of counsel's investigation, is reported at 570 F.3d 105 (3d Cir.), and is reprinted in the Appendix at App. 1-52. The district court's opinion and order dated August 19, 2005, granting the petition for writ of habeas corpus with respect to Thomas' sentence but denying guilt phase relief, is reported at 388 F. Supp.2d 489, and relevant portions are reprinted in the Appendix at App. 53-119.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit holding that Thomas was prejudiced by the absence of mitigating evidence and remanding for a hearing on the extent of counsel's investigation. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

STATEMENT OF THE CASE

Brian Thomas murdered a woman named Linda Johnson in 1985. This was an extraordinarily brutal crime: Thomas shoved a crutch through the walls of Ms. Thomas' vagina and diaphragm, into her chest cavity. He used similar force to drive a blouse through the victim's rectum and intestinal wall, and into her abdomen. Thomas also beat, raped, and strangled Ms. Thomas, who was probably alive when the worst of the wounds were inflicted.

In 1986, a jury convicted Thomas of first degree murder and related charges, and the penalty phase began immediately afterwards. The

prosecution's evidence of aggravating circumstances was relatively brief – the Commonwealth incorporated its trial evidence, and demonstrated that Thomas had previously been convicted of criminal trespass and a separate "indecent assault" on a three-year-old. The details of these two crimes were only briefly described – as for the trespass, Thomas entered his neighbor's bedroom in the middle of the night, and left after she woke, recognized him, and asked him to leave; the jury was told only the age of the young victim of assault, and that the child had suffered injuries to the rectum and intestines. App. 5-6. After the prosecution finished its presentation, Thomas told the court that he would not testify and would not permit any witnesses to testify on his behalf. Nevertheless, the Commonwealth offered to stipulate to Thomas' relatively young age and the fact of his graduation from high school – both of which could be considered mitigating circumstances under Pennsylvania law – but Thomas refused again. His refusals, made repeatedly during a colloquy taking several pages of transcript, were crystal clear:

> DEFENSE COUNSEL: Mr. Thomas, you recall during the case in chief we inquired as to whether or not you wanted to testify in your own behalf. Do you recall that?
>
> DEFENDANT: Yeah, I do. Why do I answer all these questions before? We done be over that already. No, I don't want to get on the stand.

THE COURT: Well, this is a different portion.

DEFENDANT: I still don't want to get on the stand.

THE COURT: Under no conditions?

DEFENDANT: No.

* * *

THE COURT: Did you discuss it with your lawyer, Mr. Watson?

DEFENDANT: Yes.

* * *

PROSECUTOR: There is no witness in existence you would like to call, sir, at this time. Yes or no?

DEFENDANT: I said no.[1]

The jury found three aggravating circumstances: that Thomas had committed a killing during perpetration of a felony; that he had a significant history of violent felony convictions; and that the death "was committed by means of torture."[2] App. 5-6. The jury found no mitigating circumstances, and accordingly sentenced Thomas to death.

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[1] The full colloquy is set out in the Third Circuit's opinion at App. 46-48.

[2] 42 Pa. C. S. §§ 9711(d)(6), (9), and (11).

On direct appeal to the Pennsylvania Supreme Court, Thomas argued that his counsel had been ineffective because he failed to present evidence of mitigating circumstances. First, Thomas complained that his lawyer should have accepted the prosecution's proposed stipulation as to his age and education – ignoring that *Thomas* himself had instructed his lawyer to decline this agreement. As for other possible mitigating evidence, Thomas attached affidavits from his mother, brother, and two sisters, saying that he was a "good son" and attentive brother who had "close relationship[s]" with his family, had "never been violent," and who had regularly engaged in "acts of kindness" while holding steady employment. App. 131-38. Thomas himself asserted, via affidavit, that at the time of his sentencing, he did not understand that he could "present evidence concerning my character as a mitigating circumstance." App. 129. Thomas' brief did not even *mention*, however, that he had refused to allow any mitigation evidence. The Pennsylvania Supreme Court rejected the claim, noting that Thomas had "specifically declined the invitation to proceed with such evidence," and that he had consulted with counsel as he made his decision. Commonwealth v. Thomas, 561 A.2d 699, 710 (Pa. 1989).

Next, in 1992, Thomas filed a petition for state collateral review. Through appointed counsel, he argued that trial counsel should have explained to him the "nature and purpose" of mitigation evidence,

and that without this advice Thomas' waiver of mitigation evidence was invalid. He also argued that his lawyer should have investigated family background mitigation. App. 120-21. But the factual proffer remained the same as on direct appeal – the affidavits from Thomas, his mother, and his siblings. Not surprisingly, the PCRA Court held that the sufficiency of counsel's representation with respect to this same evidence had already been litigated on direct appeal. App. 121-22. The court also found, in the alternative, that the mitigation evidence was weak and "could not possibly have made a difference." App. 123.

On collateral appeal, as one of his 23 claims of error, Thomas once again presented the same affidavits and claimed that his lawyer should have presented this evidence as mitigation. For the first time, now some 15 years after his trial, Thomas also made a series of mental health arguments: he argued that he was *not mentally competent* to waive his right to present mitigating evidence, and he also insisted that his lawyer should have presented evidence of his mental illness as mitigation. To prove these points, Thomas attached a series of psychological records developed in connection with several earlier convictions. He also attached the unsworn statement of a psychologist, Patricia Fleming, who concluded from her review of these

same records that Thomas had been diagnosed as a paranoid schizophrenic. App.127. This was not true.[3]

The consistent theme of the medical records was that Thomas was dangerous and not subject to rehabilitation. E.g., App. 153 (Thomas "has uncontrollable sexual impulses toward females and has also sexual aggressivity and cruelty towards animals;" he "is a serious threat in the community and needs to be placed in a correctional institution of maximum security" to neutralize his "anti-social and sadistic potentials"); App. 160 (Thomas "is a dangerous criminal [who] should not be returned to the community"); App. 150-51 (Thomas "has little empathy for others [and] little understanding of his social and moral responsibility").

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[3] Ms. Fleming was apparently referring to one 1977 report, in which the examiner explained that some of Thomas' test responses were "similar to those in the literature describing paranoid schizophrenia." App. 157. That was not a *diagnosis*, however, and this same examiner goes on to describe Thomas' ability to mostly control his thoughts and actions. Id. None of the other reports come close to a "paranoid schizophrenia" diagnosis, and indeed they repeatedly describe Thomas as competent, angry, defensive, with poor insight; that he displayed "no evidence of psychotic behavior or thought disorder," App. 147, and "[t]here are no psychological factors which would interfere with the sentencing process," App. 166.

Even worse for Thomas, these reports concerned prior crimes, two of which the jury had known nothing about. And these were not garden-variety burglaries or juvenile delinquency – they were brutal and grotesque acts. It turns out that Thomas "abused five police horses by inserting the handle of a broom into their rectums. Two of the horses were seriously injured with one dying ... Indications were that the dead horse had had the broomstick jammed 3'10" into its body." App. 139. Thomas had also molested *another* infant girl, in addition to the three-year-old boy the jury had been told about (who had also suffered injuries to his rectum and intestines as Thomas attacked him). App. 151. No wonder the medical professionals believed, and repeatedly concluded in these supposedly "mitigating" records, that Thomas was a sexual predator, without remorse, a danger to the community, and without significant hope of rehabilitation.

The state supreme court affirmed the denial of collateral review, explaining that the rationale of its previous decision – that Thomas had refused to allow mitigating evidence on his behalf – foreclosed these new variations on the argument that defense counsel should have presented such evidence. Commonwealth v. Thomas, 744 A.2d 713, 714 n.3 (Pa. 2000).

As is common in Philadelphia death penalty cases, things have gone very differently in federal court. Thomas filed a *Petition for Writ of Habeas*

Corpus and argued his lawyer had been ineffective for failing to develop and present mitigating evidence. He relied on the same family member affidavits, his own statement, the opinion of Ms. Fleming, and the various mental health reports prepared in connection with his earlier convictions and state supervision. The district court first held that the Pennsylvania Supreme Court's rejection of this claim – based on Thomas' refusal to allow mitigation evidence – was a merits decision. App. 73-74. Nevertheless, the court did not mention the deference standard in its long discussion of this claim, and analyzed the claim *de novo*, as if no state court had reviewed the evidence or decided the ineffectiveness issue. App. 76-108. The district court also thought there was no need for a hearing or cross-examination of Thomas' witnesses. App. 88-89 n.15. The court presumed that counsel had done no meaningful investigation of mitigation, because there was "no evidence" one way or the other. The court also (very briefly) summarized the mental health records and concluded that they contained "repeated diagnoses of paranoid schizophrenia and an inability to control aggressive impulses." App. 81. (In fact, *no* expert had diagnosed Thomas as a paranoid schizophrenic.)[4] Finally, the court uncritically

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[4] The court seems to have been confused about the language in one report, describing Thomas as afflicted with "Multiple Personality Disorders." App. 165. The court apparently took this to mean that Thomas had a schizophrenic, "Three Faces of Eve"-style split identity,

(continued ...)

accepted the statements of Thomas and his family that they had been ready and willing to testify about his "acts of kindness toward others and the close relationship he enjoyed with his family members," and that Thomas would have allowed them to do so. App. 82. The district court concluded that it was "reasonably probable" that the jury would not have imposed the death sentence if such evidence had been presented. App. 92-93.

As for the potentially devastating impact of Thomas' prior crimes and his repeated portrayal as a

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but this expert was merely summarizing the several "personality disorders" evident in Thomas' anger, aggression, lack of remorse or insight, his "hostility and ambivalence toward women," and his unsuitability for further treatment. There is no reference to delusions, non-alcoholic blackouts, or other symptoms of multiple personalities. Indeed, elsewhere in the same report, the examiner states there is "no indication of a formal thought disorder." App. 164.

The district court's confusion was no doubt triggered by the defense expert, Ms. Fleming, who in her affidavit misleadingly announced that Thomas had earlier been diagnosed with "severe multiple personality disorder" – leaving out the final "s," thereby transforming the phrase into a jarring and extreme diagnosis, the stuff of films. App. 127. This was, at best, a sloppy and fundamental mis-reporting of what the document actually said.

"dangerous criminal" in the supposedly mitigating mental health records, the district court brushed these concerns off in a footnote. The court explained that the jury *already* knew Thomas had committed terrible crimes, so one more case of infant molestation, along with the grotesque animal cruelty with a broomstick, would "likely" not have changed anything. App. 92 n.16.

The Third Circuit affirmed the grant of sentencing relief. The panel first held that the state supreme court had disposed of the claim on procedural grounds, rather than on the merits; the claim was not defaulted, however, because the Pennsylvania Supreme Court's discretionary practice of relaxing waiver rules in capital cases supposedly rendered *all* procedural bars inadequate. App. 18 n.4. As for the decision of the lower state court on collateral review, which had clearly rejected the claim on its merits, the Court of Appeals held that this did not count as an "adjudication on the merits" within the meaning of the habeas statute, so no deference was due. App. 10-18. On the merits, the panel held that Thomas' explicit refusal to allow mitigating evidence was essentially involuntary, because he had not been fully informed about the "nature" of mitigation. As for the Commonwealth's argument that the supposedly "mitigating" evidence contained devastating information about Thomas' prior crimes, his stone-cold lack of remorse, his uncontrollable aggression, and his lack of rehabilitative prospects, the panel simply concluded that even with this evidence the death penalty was

not a "*fait accompli*" and that one juror might well have been convinced that the "mental health history acts as a common thread" which might transform this evidence from aggravating to mitigating. App. 51.

Finally, the panel agreed with the district court that the lack of evidence regarding defense counsel's investigation suggested that none had taken place. Indeed, the panel even concluded that "Thomas' failure to discover evidence of an investigation is itself a sign that none occurred;" in other words, the defense can meet its burden of proof by failing to produce evidence that contradicts its own argument. App. 37. Nevertheless, the court remanded for a hearing on this limited issue – what, if anything, the defense lawyer did to investigate mitigation. Given that this trial took place about 25 years ago, the lawyer is now dead, and Thomas' failure to disprove his own claim has been converted to evidence *supporting* his allegations, it is hard to see how this hearing will go well for the prosecution.

REASONS FOR GRANTING THE WRIT

Over the past decade, the Third Circuit has routinely granted relief in Pennsylvania death penalty cases – the only three prisoners to be executed post-Furman have been volunteers, and even that has not happened since 1999. In the process, the Third Circuit has overlooked almost every procedural bar, second-guessed counsel, and engaged in wide-ranging *de novo* review of never-presented claims.[5]

This case, however, goes even farther. The Third Circuit here granted relief to Thomas – who committed a truly grotesque crime – because his

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[5] Just since the beginning of last year, the Third Circuit has granted relief in the following other Pennsylvania death penalty cases: Simmons v. Beard, 2009 WL 2902251 (3d Cir. 2009) (granting new trial); Kindler v. Horn, 542 F.3d 70 (3d Cir. 2008) (new penalty phase), cert. granted *sub nom* Beard v. Kindler, 129 S. Ct. 2381 (2009); Bond v. Beard, 539 F.3d 256 (3d Cir. 2008) (new penalty phase), cert. denied, __ S. Ct. __, 2009 WL 959455 (Oct. 5, 2009); Abu-Jamal v. Horn, 520 F.3d 272 (3d Cir. 2008) (new penalty phase), cert. filed, No. 08-652 (Nov. 14, 2008) (still pending); Holland v. Horn, 519 F.3d 107 (3d Cir.) (new penalty phase), cert. denied, 129 S. Ct. 571 (2008). In two other cases, the Third Circuit did not grant the writ outright, but remanded for further proceedings. Lewis v. Horn, 2009 WL 2914433 (3d Cir. 2009); Fahy v. Horn, 516 F.3d 169 (3d Cir. 2008).

counsel supposedly should have presented "mitigating" evidence at the penalty phase. But that evidence was not merely weak, it was *horrifying* and would have painted Thomas in the worst possible light. What is more, Thomas actually *refused* to allow his counsel to present mitigating evidence; and even though the state courts rejected this claim *twice* on the merits, the Third Circuit declined to apply the deference standard. The Court of Appeals even accepted Thomas' evidentiary proffers – affidavits by his siblings, mother, and one defense expert called "palpably biased" in a different case by a different court – without so much as a hearing. The only remaining issue – how much investigation did defense counsel undertake before he forewent mitigation? – is something of a foregone conclusion, because this lawyer has been dead for years, and the Third Circuit has held that the lack of evidence amounts to *proof* that counsel did *no* investigation.

This Court should grant *certiorari* not only because each of these errors is fundamental and important, but because, taken together, they reveal an improper eagerness to overturn a settled state court judgment.

I. The Court of Appeals improperly granted relief on a claim of ineffectiveness.

A. Thomas was not prejudiced by the absence of supposedly "mitigating" evidence that contained devastating information about his grotesque criminal history.

The Third Circuit held that Thomas' trial lawyer was ineffective because he did not develop and present family background and "mental health" evidence as mitigation. But this evidence would have revealed some very awful things about Thomas that the jury did not know: He once assaulted several horses (and killed at least one of them) by forcing a broom handle up their rectums; and he once molested a *different* infant girl, *in addition* to the other child the jury already knew about. The mental health records on which Thomas builds his claim not only discuss these crimes, but they are not even remotely mitigating taken at face value – they are filled with devastating language. To take just a few examples: "[Thomas] is a sexual deviate with sadistic tendencies. He has uncontrollable sexual impulses towards females and has also sexual aggressivity and cruelty towards animals;" or, "his lack of sensitivity or shame or guilt make for a poor prognosis with or without treatment;" or, "[he] is a dangerous criminal [and] should not be permitted to return to the community." App. 152-53, 160.

The Court of Appeals held that the absence of this evidence *prejudiced* Thomas. This is a basic error. Any competent defense lawyer would have avoided such devastating evidence at all costs – what Thomas did to Linda Johnson was revoltingly similar to what he did to those horses, as was what he did to the three-year-old boy, and there can be no mitigating explanation for molesting an infant girl. Virtually every mental health professional to examine Thomas concluded that he was an unrepentant, aggressive, sadistic menace. None of these experts (except, unsurprisingly, the one expert hired by the defense years after trial) actually found Thomas to be a paranoid schizophrenic, despite the Third Circuit's assumption to the contrary. To risk an understatement, these are all points favoring the prosecution.

Maybe there is some potential juror, somewhere, who would have heard this evidence and concluded that it made Thomas more sympathetic. But that cannot be the correct standard, because it is always true. Indeed, if there is any case in which the absence of supposedly "mitigating" evidence did *not* prejudice the defendant, this is it.

This Court has long recognized that the omission of "mitigating" evidence is not prejudicial where there is a strong risk of backfire. Indeed, in Strickland itself, counsel's failure to introduce mitigation evidence was justified, in large part, by the danger that such evidence would have opened the door to the defendant's criminal history. Strickland

v. Washington, 466 U.S. 668, 699-700 (1984). The defendant there did not even have a particularly serious "rap sheet" - apparently he "had engaged in a course of stealing." Id. at 674. But even a relatively minor risk is important and, as this Court has repeatedly emphasized, lawful prejudice analysis *must* take sober account of such dangers. See Schriro v. Landrigan, 127 S. Ct. 1933, 1944 (2007) (no prejudice from omission of mitigating evidence where Landrigan failed to show remorse and "flaunted" his menacing behavior); Bell v. Cone, 535 U.S. 685, 700-01 (2002) (proposed witnesses "might elicit information about respondent's criminal history," specifically prior robbery convictions, so counsel's decision to avoid such testimony was reasonable); Burger v. Kemp 483 U.S. 776, 792 (1987) (no prejudice from omission of mitigation witnesses who "might well have referred ...[to defendant's] encounters with law enforcement authorities," such as juvenile probation, "at least one petty offense" and drug abuse); Darden v. Wainwright, 477 U.S. 168, 185-86 (1986) (counsel's omission of mitigating evidence not prejudicial, where it would have "opened the door" to Darden's criminal history, including assault).

Just as important, in cases where this Court *has* granted relief on mitigation/ineffectiveness claims, there has been no significant danger of backfire. The Court has been careful to emphasize that point: In Wiggins v. Smith, 539 U.S. 510, 537 (2003), this Court explained that there was nothing "counterproductive" about the mitigation evidence, because Wiggins had no criminal history and no

history of violent behavior at all. In Rompilla v. Beard, 545 U.S. 374, 378, 383 (2005), and Williams v. Taylor, 529 U.S. 362, 368-69 (2000), the potential backfire problem was extremely limited, because the prosecution had *already* described the most prejudicial parts of the defendant's criminal history and argued at length to the jury that these details helped justify the death penalty. Williams, 529 U.S. at 368-69; Rompilla, 545 U.S. at 378, 383. That was not true here. At sentencing, Thomas' prosecutor introduced evidence that Thomas had once been convicted of trespass, and once convicted of child molestation. The jury was not told much about the details of either crime, and the jury knew *nothing* about his attacking a *different* infant, or the horse incident. And the awful foreshadowing apparent from those prior crimes goes far beyond anything in Williams or Rompilla. Nor did the "mental health" records in those other cases contain anything close to the insistent negative language that Thomas' records contained – phrases like "dangerous criminal" and "sadistic" – which would have confirmed the jury's worst fears.

The Third Circuit's two-paragraph discussion of prejudice did not properly weigh these risks, or apply the proper standard. The panel simply brushed aside the possibility that this evidence might have been damaging to Thomas, saying, "We are not convinced that the death penalty is a *fait accompli* even if evidence of Thomas' mental health history were available at sentencing." App. 51. As a statement of the governing standard, this is

completely backwards. First, the *government* need not prove the result would have been the same – on the contrary, the *defendant* "must affirmatively prove prejudice." Strickland, 466 U.S. at 693. Second, Strickland prejudice speaks in terms of probabilities, rather than a "*fait accompli*." No one – most especially the government – has to show that no other verdict was possible.

The Court of Appeals went on to conclude that "a single juror may well have believed" that "Thomas's mental health history acts as a common thread that ties all of this evidence together." App. 51. But the Strickland prejudice standard does not hinge on whether the court can imagine one juror who "may well" have been convinced. The prejudice requirement is stronger than that: "the defendant must show that [the errors of counsel] actually had an adverse effect on the defense." Strickland, 466 U.S. at 693. That means a reasonable *probability* that the evidence, *taken as a whole*, would have led to a different result. Wiggins, 539 U.S. at 534.

Indeed, Strickland itself *rejected* the might-have-influenced-the-outcome standard, because "[v]irtually every act or omission of counsel would meet that test." 466 U.S. at 693. Instead, the defendant must show that a different outcome was "reasonably probable." Id. At 695. This is an objective inquiry, independent of any "unusual propensities toward harshness or leniency," 466 U.S. at 695 – in other words, an unusually sympathetic juror is *not* the standard by which prejudice is

measured. Instead, the touchstone of the inquiry is whether the trial was rendered fundamentally unfair; the mere possibility of a different outcome or a juror who "may" have sympathized with Thomas, is not enough.

Further, a lawful prejudice inquiry must be based on a reweighing of *all* the evidence, rather than a narrow assessment of the strength of mitigation. Strickland, 466 U.S. at 695-96. But the Third Circuit did not reweigh or stand in the shoes of the jury. Instead, the panel treated the question as if it were a sufficiency issue: there must only be *some* evidence that might be accepted by *someone* as mitigating. That goes far beyond anything this Court has said in Strickland or succeeding cases.

Nevertheless, a disturbing number of Circuits have interpreted Strickland's "reasonably probable" language as the Third Circuit did here, that is, to mean that prejudice is established if one can imagine a juror who would agree with the defense. See, e.g., Belmontes v. Ayers, 529 F.3d 834, 876 (9th Cir. 2008) (capital defendant prejudiced by omission of mitigating evidence that would have revealed his role in prior murder; "the humanizing evidence ... might well have persuaded at least one juror to vote for life in prison whether he had committed one murder or two"), petition for cert. filed, No. 08-1263 (filed March 30, 2009) (still pending); Correll v. Ryan, 539 F.3d 938, 951-55 (9th Cir. 2008), and id. at 963-64 (O'Scainnlain, J., dissenting) (holding, over sharp dissent, that defendant was prejudiced by

absence of mitigating evidence that would have opened the door to damaging information, including prior rape), cert. denied, 129 S. Ct. 903 (2009); Harries v. Bell, 417 F.3d 631, 641-42 (6th Cir. 2005) (evidence of defendant's troubled background might have convinced "one juror" to change sentencing decision, even if prosecution could have introduced details of his criminal history in response).

The source of the problem may be over-interpretation of this Court's language in Wiggins that, for sentencing ineffectiveness claims, one juror is all it takes to change the outcome. 539 U.S. at 537. That is true, of course, but that is no license to speculate about whether a particularly sympathetic juror might have been convinced by this narrow slice of evidence. If there is any meaning to the standard at all, it must not revolve around a hypothetical *outlier* juror, but a *reasonable* juror, and not an especially lenient or credulous one. There must also be a reasonable *probability* (not just a possibility) that the new evidence would have changed this juror's vote, based on *all* the evidence.

It is time to reaffirm the significance of the "prejudice" component of Strickland. Only a small class of attorney omissions, or even acknowledged failures, are so fundamentally trial-changing as to undermine the fairness of the proceedings. Given the atrocity of Thomas' crime, the devastating information contained in the mental health records, and the weakness of the evidence of mental illness, there is no "reasonable probability" of a different

outcome here. A competent lawyer could reasonably choose *not* to open this particular door; the absence of this evidence did not render the trial unfair.

B. Thomas' trial counsel was not ineffective for failing to overcome his client's refusal to allow mitigating evidence.

Another flaw in Thomas' ineffectiveness claim is that he *refused* to allow his lawyer to put on *any* mitigating evidence. He even refused the prosecution's offer to stipulate to his age and educational background. The state supreme court held that this refusal precluded relief. That seems like a reasonable decision, and indeed, this Court recently rejected a similar claim. Schriro, 127 S. Ct. 1933. In that case, just as here, the defendant refused to allow mitigation evidence to be presented on his behalf; in that case, just as here, the state courts found that this refusal defeated any claim that the case in mitigation wasn't good enough. This Court held that the Arizona state court was reasonable both legally and factually. 127 S. Ct. at 1941-42, citing 28 U.S.C. § 2254(d)(1) and (2).

The Third Circuit, however, evaded Schriro and refused to apply the deference standard. First, the panel insisted that the state supreme court did not address the right claim. True, on direct appeal the state court concluded that Thomas refused to present mitigating evidence, that he "specifically declined the invitation to proceed with such evidence" after an on-the-record colloquy and after

consulting with his lawyer, and that this plain refusal prevented him from blaming his counsel for failure to present this evidence. 561 A.2d at 710. But according to the Third Circuit, the state supreme court had not identified or decided Thomas' *real* claim on direct appeal: that his refusal was not "knowing and voluntary" because he did not understand the *purpose* of mitigating evidence. App. 35.

But, for one thing, that was *not* Thomas' claim on direct appeal. In fact, at that point in the litigation, Thomas did not even *mention* his refusal to allow mitigating evidence, let alone argue that this refusal was not "knowing and voluntary."[6] The *Commonwealth* raised the issue of Thomas' refusal, not the defense, and the Pennsylvania Supreme Court agreed that this refusal, rather than any mistakes by counsel, explained the absence of such

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[6] The only question Thomas presented in his direct appeal brief to the Pennsylvania Supreme Court that was related to mitigation evidence was: "Should the Sentence of Death be Vacated Because Trial Counsel Was Ineffective for Failure to Present Any Evidence Whatever in Mitigation of the Sentence of Death, Although Such Evidence was Readily Available Because the Commonwealth Proffered a Stipulation and Because Witnesses Were Prepared to Testify?" *Brief for Appellant Brian Thomas (Direct Appeal)*, No.106 EDA 1986, at ix (1988). Thomas did not refer *at all* to his refusal to permit mitigation evidence.

evidence.[7] Thus, just as in Schriro, this claim was not properly presented to the state courts in the first place.

More importantly, the claim that was supposedly missed by the state supreme court could not justify collateral relief. This Court noted in Schriro that "we have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence," 127 S. Ct at 1942, and there is no "specific colloquy" required, either, id. at 1943. As a result, this claim would have required making new law; counsel can hardly have been ineffective for not anticipating a non-existing "advice" requirement. On the contrary, as long as

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[7] This was not the thrust of Thomas' claim on collateral appeal, either. App. 60. There, Thomas argued at length that he was *mentally incompetent* and thus was not capable of refusing to present mitigation evidence, which should have prompted the trial court to order an evaluation *sua sponte*. Thomas also argued that counsel should have *investigated* psychological mitigation (and therefore would also have realized, despite appearances to the contrary, that his client was incompetent). If Thomas was incompetent to participate in his own defense, it would not have made any difference to advise him differently. At any rate, Thomas obviously knew that "mitigation" evidence could include information not directly related to the crime – for example, his age and education, to which the government offered to stipulate before Thomas flatly refused.

the defendant was adamant and coherent, counsel was not required to ignore him. *Compare* Knowles v. Mirzayance, 129 S. Ct. 1411, 1421 (2009) ("Competence does not require an attorney to browbeat a reluctant witness into testifying").

Having decided that no deference was due, the panel engaged in *de novo* review of the claim, and once again placed all of the burden of proof on the prosecution. The court found that "we cannot conclude that Thomas' conduct at sentencing eliminated all possibility that counsel's performance caused him prejudice." App. 49-50. In other words, even though Thomas *seemed* to rule out any mitigating evidence, if one reads between the lines, he *might* have allowed such evidence if different questions had been asked, or maybe he would have stopped objecting if counsel had simply ignored him and barreled ahead. Actually, there is no evidence (apart from Thomas' self-serving affidavit, created years later, and never even subject to cross-examination) that he would have allowed *any* mitigating evidence, but the mere possibility is apparently enough.

But when a defendant refuses to allow his lawyer to present mitigation evidence, his later claim that he *didn't really mean it* should be received with skepticism. Further, the *prisoner* has the burden that he likely would have allowed mitigation – it is not the prosecution's burden to "eliminate all possibility" of prejudice. Thomas' refusal to allow

mitigation evidence was rather clear, and as a result the Third Circuit should not have granted relief.

The Third Circuit's conclusion that this case "bears no resemblance to Schriro" is thus another remarkable overstatement. Of *course* it "bears resemblance" to Schriro. The Third Circuit was not free to deny deference to the state court's decision, and the panel was also wrong to conclude that counsel was professionally obligated to override Thomas' belligerent refusal to allow mitigation evidence.

C. The Court of Appeals incorrectly granted relief based on the self-serving statements of Thomas' family members and a hired expert, without even a hearing or cross-examination.

As a necessary step in concluding that Thomas' counsel should have presented the "mitigating" evidence he now relies upon, the Third Circuit uncritically accepted all of Thomas' factual proffers at face value – without a hearing, without cross-examination, and without much explanation. But the credibility of these witnesses is subject to serious question.[8] It is a fundamental point: the

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[8] As the Commonwealth argued below, Thomas is not entitled to an evidentiary hearing in federal court, for two obvious reasons – he was not diligent in developing the state court record, and the state court's resolution of

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decision to overturn a presumptively valid state court judgment on the basis of factual assertions recited in pieces of paper presented by defense lawyers is unjustifiable – period.

Prisoners who believe that their convictions or sentences were obtained "in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), must prove – not simply allege or offer to prove – that they are entitled to the extraordinary relief they seek under the standards prescribed by statute and the Supreme Court's decisions. See, e.g., Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942) ("If the result of the [state court] adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential injustice be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a

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the claim was reasonable given the record before it. See 28 U.S.C. § 2254(d)(1), (e)(2); see also Schriro, 127 S. Ct. at 1940 (no federal hearing available where state court findings were reasonable). After all, Thomas did not present the "mental health" records for *years*.

But if the AEDPA deference standard does not apply, if the claim is not defeated by the present record, and if a hearing is not barred by Thomas' lack of diligence, there can be no relief without a hearing – these proffers cannot simply be accepted as true without any adversarial testing.

matter of speculation but as demonstrable reality"). While 28 U.S.C. § 2246 allows district courts to receive affidavits, this was not meant as a wholesale substitution for the rules of evidence. Indeed, the advisory committee notes to the relevant habeas rule recognize that it will seldom, if ever, be possible to determine from the face of an affidavit whether the affiant is credible or the facts attested are true. See 28 U.S.C. *foll.* § 2254, R.7 advisory committee note. That same commentary explains that the rule was adopted to make it easier to *deny* habeas corpus petitions without a hearing, rather than to *grant* them; the concern was that under then-existing law, district courts felt compelled to hold costly, burdensome, and unnecessary hearings, even when it appeared clear that the applicant was *not* entitled to relief, because of nonmaterial (and easily filled) gaps in the record. See id.

This Court has recognized in the habeas context that lawyer-created affidavits and defense reports should be met with skepticism rather than credulity. See Herrera v. Collins, 506 U.S. 390, 417 (1993) ("motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations," especially where the affidavits are presented years after trial). Nevertheless, the Third Circuit has now several times accepted such statements, untested and not subject to cross-examination, as proof in capital habeas proceedings. See Kindler, 542 F.3d at 84-85 (counsel ineffective for

not presenting mitigation evidence contained in affidavits of family, friends, and two defense-hired mental health experts; no hearing held); Outten v. Kearney, 464 F.3d 401, 409-10 (3d Cir. 2006) (granting ineffectiveness claim without hearing based on report of defense mitigation expert which was based on her interpetation of family affidavits and various state records); Jacobs v. Horn, 395 F.3d 92 (3d Cir.) (granting relief on claim that counsel should have presented mental health evidence to establish diminished capacity at the *guilt* phase of capital murder case, without evidentiary hearing), cert. denied, 546 U.S. 962 (2005). See also Libberton v. Ryan, 2009 WL 3152389, *21-*24 (9th Cir., Oct. 2, 2009) (granting penalty phase relief largely on basis of untested affidavits.)

There may be some extraordinary case where the defendant's proffered evidence is undisputed or so inherently trustworthy that a hearing is unnecessary.[9] But there is nothing reliable about

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[9] Part of the problem may be the perception that if counsel is shown not to have done much of an investigation, the strength of the missed evidence does not matter. But that kind of thinking upends the Strickland standard. Counsel's omissions must be *prejudicial*, and that means the absence of this evidence rendered the trial unfair. To meet that standard, the missing evidence must be credible and persuasive, and these qualities cannot simply be assumed or accepted

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Thomas' evidence. His mother and siblings, who testified to his being "thoughtful and kind," obviously have a bias here; it is also hard to square their stories with Thomas' violent criminal history, and with the medical records that portray him as dangerous and sadistic. Their affidavits were plainly prepared by Thomas's counsel – the format and language are similar, and they were all signed the same day. Thus, it is impossible to know what these witnesses would actually *say*, let alone whether their credibility could withstand cross-examination.

As for Thomas' mental health expert, Patricia Fleming: the Eleventh Circuit once found this same witness to be "palpably biased" in a different capital case. Tompkins v. Moore, 193 F.3d 1327, 1339 (11th Cir. 1999), cert. denied, 531 U.S. 861 (2000). The court in Moore described at length Ms. Fleming's lopsided psychological opinion – "[s]he accepted everything Tompkins told her as the gospel ... [she was] unwilling[] to concede that the kidnappings and rapes Tompkins admitted committing at knife point are violent crimes ... She described him as a 'perpetual victim.'" Id. In addition, Ms. Fleming "mischaracterized" evidence to support her opinions, and even opined that Tompkins' young victim might not even be dead, despite the "overwhelming evidence" which included identification of the

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through the untested assertions of defense counsel and biased witnesses.

victim's "skeletal remains." Id. at 1338. The Eleventh Circuit went so far as to conclude, "There is no real possibility that a jury would have been swayed by anything she said." Id. at 1339.

If the Eleventh Circuit can reject Ms. Fleming's opinion as "palpably biased" and even insufficient to change the mind of *any* reasonable juror, it should go without saying that the Third Circuit was wrong to assume the *truth* of her unsworn statement.

To be clear: there should not be a hearing in this case, because Thomas' claim should be denied on the papers. The record simply does not suggest the need to go further, and much of Thomas' evidence would be barred because he failed to timely develop the record in the state courts. But *if* the federal courts believe there is potential merit here, and *if* an evidentiary hearing is not barred, there can be no finding of counsel's ineffectiveness without a hearing. The next step would be for the defense to actually present its witnesses, and for the prosecution to test the "mitigation" evidence. Settled state court judgments should not be overturned without these basic steps. The point is important and worthy of this Court's attention.

II. The Third Circuit failed to apply the deference standard, even though both the state supreme court, and the state trial court on collateral review, rejected this ineffectiveness claim on the merits.

The deferential habeas standard applies to "any claim that that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Thomas' ineffectiveness/mitigation claim was rejected on the merits *both* by the state supreme court, and by the trial court. The decision of the Pennsylvania Supreme Court is due deference; but if (as the Third Circuit held) this was somehow an invalid *procedural* holding, then the decision of the trial court is due deference because it, too, was an "adjudication on the merits" by any reasonable definition of that term.

Because the deference standard is so critical to the current habeas statute, this Court should grant *certiorari* and affirm the importance of deferring to state court merits decisions.

A. The Pennsylvania Supreme Court's rejection of Thomas' ineffectiveness claim is due deference.

The Pennsylvania Supreme Court first rejected Thomas' ineffectiveness/mitigation claim on direct appeal more than twenty years ago, and concluded that Thomas' adamant refusal to allow any mitigating evidence to be presented on his behalf foreclosed relief. On collateral

appeal, when Thomas raised the claim again – this time accompanied by his "mental health" evidence – the Court explained that it had already rejected the core of the claim; that is, Thomas' refusal to put on a mitigation case prevents him from blaming his lawyer for not presenting mitigating evidence, "mental health" evidence included. 744 A.2d at 714 n.3.

The Third Circuit found that this second decision was a *procedural* ruling, and it was inadequate to boot. App. 18-19 n.4. While that "inadequacy" holding was incorrect,[10] its premise – that this was purely a

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[10] This is yet another application of the Third Circuit's oft-repeated (and still disturbing) holding that there was *no such thing as an adequate procedural rule* in Pennsylvania death penalty cases pending in the mid-1990s. The reasoning goes something like this: the Pennsylvania Supreme Court reserved the right to "relax" the rules of waiver in death penalty cases in the interest of justice. According to the Third Circuit, that means that the application of every state rule was uncertain; such uncertainty, in turn, rendered every rule inadequate, resulting in *de novo* review in federal court of every claim barred by a state procedural rule. This remarkably broad and defendant-friendly definition of "inadequacy" is at issue in another case from the Third Circuit presently before this Court. See Kindler, No. 08-992 (oral argument scheduled for Nov. 2, 2009). Even if Kindler were to resolve and correct the Third Circuit's unlawful approach to state procedural bars, however, that would not solve the problem here. That would still leave in place the Third Circuit's incorrect merits

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procedural rule – was also wrong. As this Court has recently held, when a state court rejects a claim "after concluding that it had been previously determined," that is a decision on the merits. See Cone v. Bell, 129 S. Ct. 1769, 1780 (2009); see also Commonwealth v. Gribble, 863 A.2d 455, 462 (Pa. 2004) (explaining operation of Pennsylvania's "previous litigation" rule; when core of claim already rejected on the merits, new peripheral allegations cannot overcome previous decision). Thus, deference was due.

B. Decisions of lower state courts qualify as "adjudications" under 28 U.S.C. § 2254(d).

On its face, the language of § 2254(d) applies to decisions by *all* state courts – trial courts as well as appellate tribunals – and this Court has previously assumed that deference would be due to decisions by state trial judges.[11] The Third Circuit held below, however, that the merits decision of a lower court is *not* an "adjudication," at least not where the decision was later

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analysis, its decision to grant relief by assuming the truth of Thomas' proffers, its misidentification of a state court decision on the merits as a procedural bar, and its decision to strip the state trial court's decision of the deference it was due as an "adjudication on the merits."

[11] Wiggins, 539 U.S. at 534 (applying *de novo* review where "*neither* of the state courts below reached this prong of the Strickland analysis") (emphasis added).

affirmed by operation of a procedural rule that the federal court considers inadequate. This decision has deepened a split of the circuits on the issue.[12]

The statute's phrasing, "adjudication on the merits," is neither difficult to interpret or mysterious in operation. Its primary function is to require a *merits* rather than a *procedural* holding as a prerequisite to deference. See, e.g., Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004) ("we conclude that the force of the phrase 'adjudicated on the merits' lies in the words 'on the merits'"), cert. denied, 546 U.S. 963 (2005); Miller v. Johnson, 200 F.3d 274, 281 & n.4 (5th Cir. 2000) ("adjudication on the merits" is "a term of art that refers to whether a court's disposition of the case was substantive, rather than procedural"), cert. denied, 531 U.S. 849 (2000); Green v. Johnson, 116 F.3d 1115, 1121 (5th Cir. 1997) (phrase is "term of art" describing the court's decision – substantive vs. procedural – rather than the *quality* of the disposition). But the Third Circuit here

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[12] *Compare* Liegakos v. Cooke, 106 F.3d 1381, 1385 (7th Cir. 1997) (state trial court decision, later affirmed on procedural grounds, does not count as "adjudication on the merits"), *with* Hirschfield v. Payne, 420 F.3d 922, 928-29 (9th Cir. 2005) (applying deference to decision of trial court not addressed on appeal). See also DeBerry v. Portuondo, 403 F.3d 57, 68 (2d Cir.) ("[i]t is not clear whether an adjudication on the merits by a trial court, which is neither explicitly [affirmed or rejected on appeal], is sufficient to trigger AEDPA review"), cert. denied, 546 U.S. 884 (2005).

focused on the other part of the phrase, and found that even if a state court *says* it is resolving a particular federal claim, this is not an *adjudication* unless the decision *also* has "preclusive effect." App. 14. According to the panel, the lower state court's rejection of Thomas' ineffectiveness claim was not "preclusive" because the state supreme court affirmed on a different, and supposedly invalid, procedural ground, and so, for purposes of AEDPA deference, the trial court decision does not exist. Id.

There are several problems with this logic. First, the statute neither says nor implies that preclusiveness is a prerequisite to deference. On the contrary, an "adjudication" is simply a judicial resolution of a claim.[13] More than that seems a stretch. After all, requiring the federal courts to measure the *res judicata* effects of a state court decision would often require exploration of intricate state rules governing *what* state courts are governed by *which* previous decisions; this level of involvement with state rules would be at odds with the purpose of AEDPA,

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[13] Black's Law Dictionary, which the Court of Appeals cited in its discussion of this point, defines an "adjudication" as "the process of judicially deciding a case" *or* a "judgment," which in turn simply means "a decree and any order from which an appeal lies" *or* a "final determination of the rights and obligations of the parties in a case." *Black's Law Dictionary* 7th ed. (West 1999). Thus the plain meaning of the term generally does *not* include *res judicata* effect.

and its overall design to allow the state courts to work with *less* federal interference, rather than more. One would expect the habeas statute or its legislative history to contain some sort of guideline or explanation of such a requirement, or even a hint somewhere that such an inquiry is necessary, but there is none.

More obviously, even if there is a *res judicata* requirement, the trial court's decision in this case was "preclusive" in every meaningful sense. If the parties were back in state court, the issue of mitigation ineffectiveness could not be relitigated: under Pennsylvania law, "a court involved in later phases of a litigated matter should not reopen questions decided by another judge of the same court or by a higher court in earlier phases." Melley v. Pioneer Bank,N.A., 834 A.2d 1191 (Pa. Super. 2003), citing Riccio v. American Republic Ins. Co., 550 Pa. 254 (1997). For example, "law of the case" applies when a defendant is granted a new trial (by a federal appeals court), and it precludes the defendant from thereafter relitigating issues raised and decided the first time around. Commonwealth v. McCandless, 880 A.2d 1262 (Pa. Super. 2005.) That is exactly the situation here. The decision may not be *precedential* with respect to other cases, and it may not bind the state supreme court, but that is often true – for example, most decisions of the intermediate state appellate court are unpublished, and even published ones do not constrain the Pennsylvania Supreme Court. That does not mean these decisions do not count as "adjudications," or else AEDPA's reach would be very limited indeed.

As support for its implicit preclusiveness requirement, the Third Circuit relied primarily on language from a Second Circuit case, Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (defining "adjudicate," in part, as "to settle finally [] the rights and duties of the parties"). But Sellan had nothing to do with this issue – the Second Circuit there only decided that deference is due to an unexplained state court decision. There was no need to distinguish between lower and appellate state decisions, or between state court decisions with preclusive effect and those without. The few other authorities cited are similarly unhelpful and do not remotely require preclusiveness as a prerequisite to AEDPA deference. None of the cases cited as adopting Sellan's language addressed the issue of whether a lower court decision counts as an "adjudication."[14]

Even more remarkably, the panel did not cite *any* Pennsylvania law to establish that *this* lower court decision was not "preclusive." The Court of Appeals cited several federal cases and national treatises, none of which involve Pennsylvania law or actually address the issue

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[14] Teti v. Bender, 507 F.3d 50, 56-57 (1st Cir. 2007) (state court decisions on the merits, as opposed to procedural rulings, are due deference), cert. denied, 128 S. Ct. 1719 (2008); Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004) (same), cert. denied, 546 U.S. 963 (2005); Muth v. Frank, 412 F.3d 808, 815 (7th Cir.) (same), cert. denied, 546 U.S. 988 (2005); Schoenberger v. Russell, 290 F.3d 831, 840 (6th Cir. 2002) (Keith, J., concurring) (same).

presented here. App.14-15. In fact, whatever these sources might say, under Pennsylvania law the PCRA trial court's rejection of Thomas' ineffectiveness claim "finally resolved" the issue as between these parties.

The question of whether a lower state court decision counts as an "adjudication on the merits" is relatively common – indeed, this issue comes up more often as federal courts reject state appellate decisions applying procedural bars as "inadequate" (as the Third Circuit did here). In order to ensure that these lower state court decisions receive the deference they are due, this Court should grant *certiorari* and review the question.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-9006 & 05-9008

BRIAN THOMAS,

Appellant in No. 05-9006

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; DONALD T. VAUGHN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

Appellants in No. 05-9008

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
District Court No. 00-cv-803
District Judge: The Honorable Louis H. Pollak

App. 2

Argued May 1, 2009

Before: McKEE, SMITH, and STAPLETON,
Circuit Judges

(Filed: July 1, 2009;
Amended: July 15, 2009)

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OPINION

SMITH, *Circuit Judge.*

In 1986, Brian Thomas was convicted in the Court of Common Pleas of Philadelphia of murder in the first degree, burglary, involuntary deviate sexual intercourse, and rape. The jury sentenced him to death. Thomas was unsuccessful on direct appeal, *see Commonwealth v. Thomas*, 561 A.2d 699 (Pa. 1989) (hereinafter "*Thomas I*"), and in his state court petition for post-conviction relief, *see Commonwealth v. Thomas*, 744 A.2d 713 (Pa. 2000) (hereinafter "*Thomas II*"). Thomas then petitioned the District Court for habeas relief pursuant to 28 U.S.C. § 2254. *Thomas v. Beard*, 388 F. Supp. 2d 489 (E.D. Pa. 2005) (hereinafter "*Thomas III*"). The District Court granted Thomas sentencing relief based on his trial counsel's ineffectiveness, but denied his guilt-phase claims. *Id.* at 536. Both Thomas and the Commonwealth appealed.[1] For the reasons that follow, we will affirm the District Court's guilt-phase determinations, but will vacate the District Court's order for sentencing relief, and

[1]We refer to Martin Horn, Donald Vaughn, Joseph Mazurkiewicz, and the District Attorney of Philadelphia County collectively as the "Commonwealth."

remand for an evidentiary hearing concerning the extent, if any, of trial counsel's pre-sentencing investigative efforts to obtain mitigation evidence.

I.

On August 9, 1985, one of Linda Johnson's roommates walked into their Philadelphia apartment and found Johnson's dead body lying face-down on a broken box-spring in her room. Johnson's eyes and face were swollen, and her nose and right temple were bleeding. She had a bite mark on her cheek and bruises on her arms and thighs. She was naked from the waist down, and blood was seeping from her vagina and rectum. A blood-encrusted crutch was found near her body. It was also determined that a television set and a can containing about twenty-nine dollars in change were missing from the apartment.

An autopsy of Johnson revealed that she had three fractured ribs and a twenty-three inch tear inside her body that reached from her vagina to her chest cavity. A shirt also had been inserted into her rectum, through her intestinal wall, and into her abdominal cavity with a blunt instrument while she was still alive. Additionally, sperm was found inside her vagina.

Three days after the discovery of Johnson's body, the Commonwealth arrested Thomas for her rape and murder, and for burglarizing her

apartment. At trial, three witnesses testified that they had seen Thomas and Johnson together at or near her apartment within hours of the discovery of her body. The Commonwealth also introduced medical evidence that: the sperm found in Johnson's vagina was deposited around the time that Thomas and Johnson were last seen together; the sperm was deposited by a non-secretor (one who does not secrete traces of blood in bodily emissions); Thomas was a non-secretor; blood found on Thomas' boxer shorts was human blood; and the bite mark on Johnson's cheek matched Thomas' teeth. Finally, the Commonwealth introduced evidence that Thomas was in possession of both the missing television and the twenty-nine dollars in change.

On February 6, 1986, the jury found Thomas guilty of murder in the first degree, rape, involuntary deviate sexual intercourse, and burglary. During the penalty phase, which began later that day, the Commonwealth offered evidence of three aggravating circumstances to support its request for the death penalty: 1) killing while perpetrating another felony, namely rape; 2) killing by means of torture; and 3) a significant history of violent felony convictions. *See* 42 Pa. Cons. Stat. § 9711(d)(6), (8), (9). The Commonwealth relied on trial evidence already presented to establish the first two aggravating circumstances. To establish the third, the Commonwealth offered evidence of Thomas' 1978 conviction for felonious aggravated assault and

indecent assault on a three-year old, which caused injuries to the child's rectum and intestines, and Thomas' 1984 conviction for criminal trespass where Thomas unlawfully entered a neighbor's bedroom while she was sleeping.

At the close of the Commonwealth's penalty-phase evidence, Thomas' court-appointed counsel informed the court that Thomas would not be presenting any mitigating evidence. The court determined that Thomas should be colloquied regarding the decision to present no mitigating evidence. After this colloquy, Thomas, through his counsel, declined the Commonwealth's offer to stipulate to his age and to the fact that he graduated from high school. As a result, Thomas presented no evidence of mitigating circumstances during the penalty phase. Nonetheless, in its penalty-phase charge to the jury, the court recited all the mitigating circumstances listed in Pennsylvania's sentencing statute for first-degree murder, 42 Pa. Cons. Stat. § 9711 (e), and told the jury that "you may consider anything as a mitigating circumstance."

The jury found the three proposed aggravating circumstances and no mitigating circumstances. Accordingly, Thomas was sentenced to death on the first-degree murder conviction and to consecutive terms of imprisonment of up to fifty years for the burglary, rape, and involuntary deviate sexual intercourse convictions.

Thomas, represented by new court-appointed appellate counsel, unsuccessfully challenged his conviction and sentence on direct appeal to the Pennsylvania Supreme Court. *Thomas I*, 561 A.2d at 710. His subsequent petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. Cons. Stat. § 9541 *et. seq.* (hereinafter "PCRA"), was also denied. *Thomas II*, 744 A.2d at 717. Thomas then petitioned the District Court for habeas relief pursuant to 28 U.S.C. § 2254, raising twenty-three grounds for relief. *Thomas III*, 388 F. Supp. 2d at 495-96 & n.1. The District Court denied Thomas' petition as to his guilt-phase claims. *Id.* at 536. The District Court, however, determined that Thomas' trial counsel was ineffective at sentencing under *Strickland v. Washington*, 466 U.S. 668 (1984), because counsel failed to investigate and present mitigating evidence of Thomas' mental health. *Thomas III*, 388 F. Supp. 2d at 505-11. The District Court also determined that Thomas did not knowingly and intelligently waive his right to present mitigating evidence because the nature of the proceedings were not adequately explained to him, so the purported waiver could not cure the prejudice resulting from counsel's deficiencies. *Id.* at 513-16.[2] Accordingly, the

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[2]The District Court also determined that counsel's "incoherent" closing argument at sentencing exacerbated the prejudice caused by counsel's other deficient performances. *Thomas III*, 388 F. Supp. 2d at 511-513. Although we agree

(continued...)

District Court vacated Thomas' death sentence. *Id.* at 536.[3]

Thomas filed a timely appeal, and the District Court issued a certificate of appealability for three of Thomas' claims. The Commonwealth filed a cross-appeal alleging that the District Court's decision to vacate Thomas' sentence was in error.

II.

The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254, and we have jurisdiction under 28 U.S.C. §§ 1291 and 2253. Since the District Court ruled on Thomas' habeas petition without an evidentiary hearing, our review of its

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[2](...continued)
with the District Court that "counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment" and that "[c]ounsel wholly failed in his duty to present a closing argument helpful to Thomas," *id.* at 513, it does not appear that the Commonwealth has raised this issue in its cross-appeal. Therefore, we will not address counsel's closing argument in our review.

[3]In light of its decision to vacate Thomas' sentence on the basis of Thomas' *Strickland* claim, the District Court dismissed, without prejudice, two of Thomas' other claims: *per se* ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984), and jury bias at sentencing. 388 F. Supp. 2d at 516, 528-30.

decision is plenary. *See Marshall v. Hendricks*, 307 F.3d 36, 50 (3d Cir. 2002). This means that we review the state courts' determinations under the same standard that the District Court was required to apply. *Id.*

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "federal courts are to review a state court's determinations on the merits only to ascertain whether the state court reached a decision that was 'contrary to' or involved an 'unreasonable application' of clearly established Supreme Court law, or if a decision was based on an 'unreasonable determination' of the facts in light of the evidence presented." *Fahy v. Horn*, 516 F.3d 169, 189 n.20 (3d Cir. 2008). But when "the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA . . . do not apply." *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). "In such an instance, the federal habeas court must conduct a de novo review over pure legal questions and mixed questions of law and fact, as a court would have done prior to the enactment of AEDPA." *Id.* A state court's factual determinations, however, "are still presumed to be correct, rebuttable upon a showing of clear and convincing evidence." *Id.*

III.

We will first address the three claims before us on Thomas' appeal: 1) the trial court's "reasonable doubt" instruction to the jury was unconstitutional; 2) the Commonwealth's closing argument at sentencing was unconstitutional, and Thomas' counsel was ineffective for not objecting to it; and 3) Thomas' counsel was ineffective for failing to life-qualify the jury.

A.

At the outset, the parties contest whether AEDPA deference pursuant to Section 2254(d) applies to Thomas' claims. Section 2254(d) "applies only to claims already 'adjudicated on the merits in State court proceedings.'" *Appel*, 250 F.3d at 210 (quoting 28 U.S.C. § 2254(d)). Here, the PCRA court ruled on the merits of two of Thomas' claims–his closing argument and life-qualification claims–but did not address the third-his objection to the reasonable doubt instruction. On appeal, the Pennsylvania Supreme Court dismissed all three claims as waived because they were not raised in Thomas' amended PCRA petition. *See Thomas II*, 744 A.2d at 715 n.4. The Commonwealth argues that the PCRA court's decision on the merits is an "adjudicat[ion] on the merits in State court proceedings," which renders Section 2254(d) applicable to two of Thomas' claims. Thomas, however, contends that the Pennsylvania Supreme Court's determination

supercedes the PCRA court's decision for the purposes of determining whether AEDPA deference is due. Accordingly, we must decide whether a claim has been "adjudicated on the merits in State court proceedings" when a lower state court decided the claim on its merits, but the reviewing state court resolved the claim entirely on procedural grounds.

The Second Circuit has provided a textual analysis of "adjudicated on the merits" as used in Section 2254(d):

> When Congress uses a term of art such as "adjudicated on the merits," we presume that it speaks consistently with the commonly understood meaning of this term. *See* [*Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)]. "Adjudicated on the merits" has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground. *See e.g., Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 . . . (2001) (noting one definition of an "on the merits" adjudication as "one that actually passes directly on the substance of a particular claim before the court") (internal quotation marks and alterations omitted). *See also, e.g.,*

> *Black's Law Dictionary* 42 (7th ed. 1999) (adjudication: "1. The legal process of resolving a dispute; the process of judicially deciding a case. 2. Judgment."; adjudicate: "1. To rule upon judicially. 2. Adjudge."); *Webster's Third New Int'l Dictionary* 27 (1993) (adjudicate: "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised; enter on the records of a court (a final judgment, order, or decree of sentence)").

Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001). In *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), *rev'd on other grounds sub nom. Rompilla v. Beard*, 545 U.S. 374 (2005), we quoted with approval the Second Circuit's interpretation of "adjudicated on the merits." *Id.* at 247 (quoting *Sellan*, 261 F.3d at 311). Other courts of appeals have done so as well. *See Teti v. Bender*, 507 F.3d 50, 56-57 (1st Cir. 2007); *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004); *see also Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005); *Schoenberger v. Russell*, 290 F.3d 831, 840 (6th Cir. 2002) (Keith, J., concurring).

We reiterate today our approval of the Second Circuit's interpretation of "adjudicated on the merits." For the purposes of Section 2254(d), a claim has been "adjudicated on the merits in State

court proceedings" when a state court has made a decision that 1) finally resolves the claim, and 2) resolves the claim on the basis of its substance, rather than on a procedural, or other, ground. *See Rompilla*, 355 F.3d at 247 (quoting *Sellan*, 261 F.3d at 311); *see also Lambert*, 393 F.3d at 969 ("[A]state has 'adjudicated' a petitioner's constitutional claim 'on the merits' for purposes of § 2254(d) when it has decided the petitioner's right to post conviction relief on the basis of the substance of the constitutional claim advanced, rather than denying the claim on the basis of a procedural or other rule precluding state court review of the merits."); *Sellan*, 261 F.3d at 312 ("For the purposes of AEDPA deference, a state court 'adjudicate[s]' a state prisoner's federal claim on the merits when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment.").

We agree with the Commonwealth that an "adjudication on the merits" can occur at any level of state court. Unlike other statutes that address federal review of state court decisions, the plain language of Section 2254(d) does not specify that the "adjudication on the merits" be from any particular state court. *Compare* 28 U.S.C. § 2254(d) *with* 28 U.S.C. § 1257(a) ("Final judgments or decrees *rendered by the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court by writ of certiorari . . . ." (emphasis added)). But to qualify as an "adjudication on the merits," the state court decision must finally

resolve the claim. This means that the state court's resolution of the claim must have preclusive effect. *See Rompilla*, 355 F.3d at 247 (quoting *Sellan*, 261 F.3d at 311).

Applying this rule to the state court decisions here, we see no "adjudication on the merits." Here, the Pennsylvania Supreme Court decided Thomas' claims on purely procedural, not substantive, grounds. This decision stripped the PCRA court's substantive determination of Thomas' claims of preclusive effect. *See* Restatement (Second) of Judgments § 27 cmt. o (1982) ("If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result . . . [and] [i]f the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination."); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4432 (2d ed. 2002) ("If the appellate court terminates the case by final rulings as to some matters only, preclusion is limited to the matters actually resolved by the appellate court . . . ."); *see also, e.g., Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 327-28 (4th Cir. 2005) (holding that, although the trial court reversed an administrative determination on, *inter alia*, Constitutional grounds, res judicata did not apply to the

Constitutional claims because the appellate court affirmed the trial court's decision without reaching the Constitutional issues). The Pennsylvania Supreme Court's procedure-based decision remains as the only resolution of Thomas' claims with preclusive effect. Accordingly, there has been no "adjudication on the merits," and AEDPA deference is not due. *See also Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997) (noting that Section 2254(d) did not apply to claims decided on the merits in state trial court, but disposed of on procedural grounds in the state court of appeals because "the disposition of the last state court to issue an opinion determines whether the state has invoked a ground of forfeiture" (citing *Ylst v. Nunnemaker*, 501 U.S. 797 (1991))).

The Commonwealth argues that the result we reach today is contrary to our decision in *Nara v. Frank*, 488 F.3d 187 (3d Cir. 2007). It is not. In *Nara*, the lower state court decided the merits of the petitioner's incompetency claim and the appellate court subsequently reversed this decision on procedural grounds. *Id.* at 191-92. Nonetheless, we remarked that the lower state court "plainly *did* reach the merits of Nara's incompetency claim . . . ." Id. at 201. This statement, however, was not directed at any Section 2254(d) analysis; it was made in the context of determining whether the District Court correctly accorded a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1) to the factual determinations of the lower state court.

Id. at 200. As we pointed out, "the § 2254(e)(1) presumption of correctness applies regardless of whether there has been an 'adjudication on the merits' for purposes of § 2254(d)." *Id.* at 200-01. As a result, the *Nara* panel made no ruling on whether the lower court's decision on the merits was an "adjudication on the merits" for the purposes of Section 2254(d). Indeed, we described the lower court as having "reach[ed]," rather than adjudicated, the merits of Nara's claim.

Fahy v. Horn is also consistent with our decision in this case. In *Fahy*, we applied AEDPA deference to a lower court's decision on the merits even though a state appellate court dismissed the petitioner's subsequent appeal as waived. 516 F.3d at 197, 199, 202-03. The unique facts of that case, however, warranted such a disposition. In *Fahy*, while his appeal of the lower court's decision on the merits was pending, the petitioner filed a motion to "withdraw his appeal and to waive all collateral proceedings so that his death sentence could be carried out." *Id.* at 177. The appellate court remanded the appeal to the lower court "for a colloquy to determine whether petitioner fully understands the consequences of his request to withdraw his appeal and to waive all collateral proceedings." *Id.* After conducting the colloquy, the lower court determined that the petitioner's withdrawal and waiver decisions were made knowingly and voluntarily, and the petitioner appealed. *Id.* at 178; *see also Commonwealth v. Fahy*, 700 A.2d 1256,

1258-59 (Pa. 1997). The appellate court affirmed the validity of the petitioner's withdrawal and waiver, and dismissed the appeal. 516 F.3d at 178; 700 A.2d at 1259-60.

On federal habeas review, we acknowledged that "the state supreme court never reached the merits of [petitioner's] petition because of his waiver, [but] we believe that deference still applies to the [lower state] court's decision." 516 F.3d at 203 n.36. We arrived at that conclusion because after the appellate court affirmed the validity of the petitioner's withdrawal and waiver, the lower court's decision on the merits was the decision that finally resolved the claims. *See Angel v. Bullington*, 330 U.S. 183, 189 (1947) ("If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him."). Therefore, the lower court's decision was an "adjudication on the merits" that warranted AEDPA deference.

In sum, for the purposes of Section 2254(d), a claim has been "adjudicated on the merits in State court proceedings" when a state court has made a decision that finally resolves the claim based on its substance, not on a procedural, or other, ground. Here, neither the Pennsylvania Supreme Court nor the PCRA court "adjudicated on the merits" the three claims before us on Thomas' appeal.

Accordingly, we will review purely legal questions and mixed questions of law and fact *de novo*, but presume the correctness of any factual conclusions made by the state courts. *See Appel*, 250 F.3d at 210.

B.

Having decided the appropriate standard of review, we will move to the merits of the claims at issue in Thomas' appeal.[4]

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[4]Notwithstanding the Pennsylvania Supreme Court's decision to dismiss them on procedural grounds, Thomas has exhausted all three claims before us on his appeal. *See Holland v. Horn*, 519 F.3d 107, 112 (3d Cir. 2008) ("[A] petitioner will have exhausted his state remedies even if the state court does not address his federal claims on the merits but, instead, rejects the claims on an independent and adequate state ground.").

Additionally, there is no procedural bar on federal habeas review. Since Thomas filed his PCRA petition before the Pennsylvania Supreme Court abandoned its "relaxed waiver" doctrine for capital cases in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), the Pennsylvania Supreme Court's dismissal of Thomas' claims as waived "is not adequate to support the judgment for the purpose of finding a procedural default under federal habeas law." *Jacobs v. Horn*, 395 F.3d 92, 117-18 (3d Cir. 2005). The Commonwealth does not contest this point, but does preserve it for potential en banc or Supreme Court review.

(continued...)

1.

Thomas' first claim is that the trial court's instruction on the definition of reasonable doubt violated due process because it suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. Here, the trial court instructed the jury that a reasonable doubt is "such a doubt as would cause a reasonable person to restrain from acting in a matter of great importance in his or her own life." Thomas argues that the words "restrain from acting" set the Commonwealth's burden of proof too low.

"The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." *In re Winship*, 397 U.S. 358, 361 (1970). Trial courts are free to provide juries with a definition for reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Further, "so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt,

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[4](...continued)

Finally, we reject the Commonwealth's suggestion to frame all of Thomas' claims as challenges to counsel's effectiveness, including those that assert trial errors. Our practice is to entertain the merits of the claims advanced. *See, e.g., Fahy*, 516 F.3d at 189 ("Because there are no procedural barriers to our exercise of jurisdiction, we proceed to the merits of Fahy's habeas petition.").

the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.* (internal citations omitted). Our task on review is to determine "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet" the reasonable doubt standard. *See id.* at 6 (citing *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991)).

The Pennsylvania Supreme Court has a long history of approving and recommending the "restrain from acting" formulation that the trial court used here to define reasonable doubt. In 1954, the Court included this formulation in its "standard and approved form of charge": a reasonable doubt "must be an honest doubt arising out of the evidence itself, the kind of a doubt that would restrain a reasonable man (or woman) from acting in a matter of importance to himself (or herself)." *Commonwealth v. Donough*, 103 A.2d 694, 697 (Pa. 1954). Since then, the Court has affirmed the use of the "restrain from acting" formulation on many occasions. *See, e.g., Commonwealth v. Marshall*, 810 A.2d 1211, 1225 (Pa. 2002) ("[W]e have explicitly approved of [reasonable doubt] instructions containing the word 'restrain' for nearly five decades." (citations omitted)); *Commonwealth v. Young*, 317 A.2d 258, 261-62 (Pa. 1974) ("[W]e have repeatedly placed our imprimatur on the charge expressed in . . . ."); *Commonwealth v. Burns*, 187

A.2d 552, 560-61 (Pa. 1963) (defining reasonable doubt as expressed in *Donough*).

The United States Supreme Court has not addressed whether the "restrain from acting" formulation is acceptable. Instead, it has repeatedly approved of defining reasonable doubt as "a doubt that would cause a reasonable person to *hesitate* to act." *Victor*, 511 U.S. at 20 (emphasis added).

Comparing the "hesitate to act" instruction with the "restrain from acting" formulation, we are inclined to agree with Thomas that the latter places a lower burden of proof on the prosecution. "Hesitate" implies a temporary interruption before acting. *See Webster's Third New Int'l Dictionary* 1061 (1966) ("hesitate . . . 1 a: to hold back in doubt or indecision: avoid facing a decision, encounter, or problem . . . b: to hold back from as if from scruple . . . 2: to delay [usually] momentarily: Pause . . . 3: Stammer . . . ."). "Restrain" suggests a more prolonged, if not permanent, period of inaction. *See id.* at 1936 ("restrain . . . 1 a: to hold (as a person) back from some action, procedure, or course: prevent from doing something (as by physical or moral force or social pressure) . . . b: to limit or restrict to or in respect to a particular action or course: keep within bounds or under control . . . 2 a: to moderate or limit the force, effect, development, or full exercise of: prevent or rule out excesses or extremes of . . . b: to keep from being

manifested or performed . . . 4 a: to deprive of liberty: place under arrest or restraint b: to deprive (as of liberty) by restraint: abridge the freedom of . . . ." (obsolete definitions omitted)). Accordingly, defining reasonable doubt as such a doubt that would "restrain" one's actions decreases, to some extent, the burden of proof that the prosecution would have to meet were the "hesitate to act" formulation employed instead.

Nonetheless, even though we believe that the "restrain from acting" formulation lessens the prosecution's burden of proof, we cannot say that its use is unconstitutional. The Supreme Court has never indicated that a reasonable doubt instruction must demand as much from the prosecution as the "hesitate to act" formulation does. Instead, the Court has merely described the "hesitate to act" formulation as a "common sense benchmark for just how substantial such a doubt must be." *Victor*, 511 U.S. at 20-21. It does not follow that any definition requiring more doubt than this benchmark is unconstitutional.

The Court has provided us with a standard for assessing the constitutionality of a reasonable doubt instruction: "'[T]aken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.'" *Id.* at 6 (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)). Applying this standard, the Court has approved of reasonable doubt instructions that defined the term

as "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon," *Holland*, 348 U.S. at 140,[5] "not a mere possible doubt . . . [but] that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge," *Victor*, 511 U.S. at 7 (emphasis omitted), and "an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare

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[5]The charge reviewed in *Holland* thus spoke in terms of a doubt sufficient to provide a basis for affirmative action in an important personal matter, as contrasted with the charge before us which spoke in terms of a doubt sufficient to provide a basis for choosing not to act in such a matter. Both, however, spoke of a doubt sufficient to control one's behavior, as contrasted with a doubt sufficient to cause one to "hesitate to act." In *Holland*, the Court expressed a preference for a "hesitate to act" charge but held that the charge given there was "not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." 348 U.S. at 140. While we have concluded that the charge given here could be understood to lower the government's burden to some degree from that imposed by a "hesitate to act" charge, that degree is no greater than the degree of lowering in *Holland*, and we are confident that here, too, the charge was not of the type that could mislead the jury.

imagination, or from fanciful conjecture," *id.* at 18 (emphasis omitted).

In contrast, the Court has held only one reasonable doubt instruction to be constitutionally deficient:

> *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.

Cage v. Louisiana, 498 U.S. 39, 40 (1990). In *Cage*, the Court reasoned that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.* at 41. The Court continued: "[w]hen those statements are then considered with reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.*

Viewed against this jurisprudential background, we conclude that the reasonable doubt instruction used here was constitutional. Although "restrain from acting" requires more doubt to acquit than "hesitate to act," it does not, by itself, so raise the threshold as to "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *See id.* at 41. As a result, the trial court's mere use of the word "restrain," though perhaps not ideal, is not enough to render its entire instruction unconstitutional.[6]

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[6]The Pennsylvania Supreme Court has also rejected arguments that the word "hesitate" must replace "restrain" in a proper reasonable doubt instruction. *See, e.g., Commonwealth v. Brown*, 368 A.2d 626, 634 (Pa. 1976) (dismissing an "object[ion] to the use of the word 'restrain', and [the] suggest[ion that] 'hesitate' is a more appropriate standard"); *see also, e.g., Commonwealth v. Porter*, 728 A.2d 890, 899 (Pa. 1999) ("[T]he distinction between 'hesitate before acting' and 'restrain before acting' is *de minimis* and clearly such a subtle variation in phrasing would not be an abuse of the trial court's discretion."). It has done so even though Section 7.01(3) of the Pennsylvania Suggested Standard Criminal Jury Instructions recommends providing juries with a definition of reasonable doubt that includes the word "hesitate." *See Commonwealth v. Collins*, 957 A.2d 237, 264 (Pa. 2008); *Commonwealth v. Rios*, 920 A.2d 790, 805-06 (Pa. 2007); *Commonwealth v. Carson*, 913 A.2d 220, 254 (Pa. 2006); *Porter*, 728 A.2d at 899-900.

2.

Thomas' second claim is that the Commonwealth's closing argument at sentencing violated his due process and Eighth Amendment rights by inviting the jury to consider an improper sentencing factor–future dangerousness. He contends that the Commonwealth's conduct was unconstitutional for two reasons: 1) it urged the jury to consider future dangerousness when contemplating the death penalty, which a jury cannot do under Pennsylvania law; and 2) it created an unacceptable risk that the jury believed, in error, that Thomas could be released on parole if he were not sentenced to death. Thomas also claims that trial counsel was ineffective for failing to object to the Commonwealth's argument or to seek curative instructions.

In reviewing the constitutionality of the Commonwealth's conduct at sentencing, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Here, at sentencing, the Commonwealth stated the following as part of its closing argument to the jury:

> There sits Brian Thomas, there sits convicted Brian Thomas. You have found what he did to Linda

Johnson. You heard what happened to [the] three year old [whom he assaulted]. . . . You heard what happened to [the neighbor whose bedroom he trespassed into].

It is not for me to say, it is not for the Judge to say. Only you can say enough. Only you can say stop.

I submit to you, ladies and gentlemen, that Brian Thomas has used up his chances. I would submit to you that it's time for somebody to say Brian Thomas, you have forfeited your right to live among civilized people by your conduct, by your behavior, what you did, why you did it and how you did it. You should not be allowed to continue.

There is not a cry here, ladies and gentlemen, for vengeance. There is not a cry here to bring back a person who is dead. [B]ut there is a cry here, ladies and gentlemen, for the type [of] person who would brutally beat, rape and sexual[ly] mutilate another human being. . . . [I]t's time for somebody to say in some way Brian Thomas, enough is enough. The citizens of Philadelphia can't tolerate

> you in their midst, take you out somewhere where your type [of] conduct will not ever be a threat to the citizens of Philadelphia again.
>
> [* * *]
>
> . . . I submit to you that based on your findings and based on the facts of this case, you must say there is no mitigation, the buck stops here, and for what you did, Brian Thomas, you should die. [Y]ou should die.

The Commonwealth's closing does not urge the jury to consider Thomas' future dangerousness as a sentencing factor. Taken in isolation, certain statements may seem to border on such an appeal. But when viewed in context, the Commonwealth's message is clear: Thomas' crimes, both past and present, are so repulsive that they warrant the death penalty. The Commonwealth's references to Johnson's murder, Thomas' assault of the three-year-old, and his trespass into a neighbor's bedroom demonstrate that the Commonwealth was framing its argument with the aggravating circumstance that it sought to show at sentencing: Thomas' history of violent felonies. With that in mind, the Commonwealth's calls for the jury to "say enough," "say stop," and to tell Thomas that "[y]ou should not be allowed to continue," are plain allusions to its claim that "Brian Thomas has used up

his chances," and that "the buck stops here, and for what you did, Brian Thomas, you should die." Indeed, the Commonwealth's use of the word "tolerate" and the phrase "your type [of] conduct" indicates that it wanted the jury to impose the death penalty because the "citizens of Philadelphia" had had enough of Thomas' past criminal conduct, not because Thomas could be a threat to society in the future. *Cf. Simmons v. South Carolina*, 512 U.S. 154, 157 (1994) (characterizing an argument that death "would be 'a response of society to someone who is a threat. Your verdict will be an act of self-defense'" as an argument to consider future dangerousness as a sentencing factor).

Nor does the Commonwealth's argument create an unacceptable risk that the jury believed that, if it did not impose the death penalty, Thomas could be released on parole. Plainly, the Commonwealth never mentioned parole, and we do not read its argument as suggesting that Thomas could be paroled from a life sentence. As a result, the Commonwealth's conduct at sentencing was constitutional.[7]

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[7]Because we see no merit to Thomas' underlying claim of error, we also hold that counsel was not ineffective for failing to object. *See Moore v. Deputy Comm'rs of SCI-Huntingdon*, 946 F.2d 236, 245 (3d Cir. 1991) (concluding that counsel was not ineffective for failing to object where "there would have been no basis for the objection").

3.

Thomas' third claim is that his trial counsel was ineffective for failing to life-qualify the jury–to determine that each juror could vote for a life sentence. *Strickland* sets the relevant test: Thomas must show that 1) his counsel's performance was deficient, and 2) his counsel's deficient performance caused him prejudice. 466 U.S. at 687. To be deficient, counsel's performance must fall below an objective standard of reasonableness. *Id.* at 687-88. To demonstrate prejudice, Thomas "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Supreme Court held that defendants had a right to life-qualify potential jurors at *voir dire*. At issue here is not whether Thomas' trial counsel should have known he had a right to ask life-qualifying questions at the time the jury was empaneled–six years before *Morgan* was decided. It is clear that he knew that he could: he asked one juror life-qualifying questions, and she responded that she could vote for a life sentence under certain circumstances. The only question in this case is whether counsel's failure to ask the rest of the jurors life-qualifying questions constituted ineffectiveness. We believe that it does not.

First, we note that the Supreme Court has never imposed an obligation on trial counsel to life-qualify a jury. *See Morgan*, 504 U.S. at 726 (framing the issue as "whether on voir dire the court must, *on defendant's request*, inquire into the prospective jurors' views on capital punishment" (emphasis added)).

Second, Thomas has not identified any relevant "[p]revailing norms of practice as reflected in American Bar Association standards and the like," *Strickland*, 466 U.S. at 688, that suggest that Thomas' counsel had an obligation to life-qualify the jury.

Third, the record does not indicate that Thomas' counsel had any reason to life-qualify any additional jurors. Thomas suggests that two jurors showed so much enthusiasm for the death penalty in their responses to the court's death-qualification question that they should have been life-qualified: 1) one juror responded with "I believe in the death penalty" when asked whether he had "any moral, religious or ethical beliefs which could prevent [him] from voting for the death penalty in a proper case"; and 2) another juror answered "[n]o" before the court finished asking the question. To us, however, neither response is so indicative of a bias in favor of the death penalty that effective counsel would have asked to life-qualify these two jurors. There are a myriad of reasons why the first juror chose to use the words that he did, and the second

juror chose to answer as quickly as he did. Without more, we will not speculate that they did so because of any enthusiasm for the death penalty.

Fourth, even if Thomas' counsel were deficient for failing to life-qualify every juror, Thomas has not shown prejudice. Since Pennsylvania's death sentence can only be imposed by a unanimous jury, *see* 42 Pa. Cons. Stat. § 9711(c)(iv), Thomas has demonstrated prejudice if "'there is a reasonable probability that, but for counsel's unprofessional errors . . .' one juror [would have] voted to impose a sentence of life imprisonment rather than the death penalty." *Bond v. Beard*, 539 F.3d 256, 285 (3d Cir. 2008) (quoting *Strickland*, 466 U.S. at 694). Thomas has provided not a shred of evidence suggesting any probability that, had his trial counsel life-qualified every juror, at least one juror would have voted to sentence Thomas to life imprisonment. He simply invites our speculation. Accordingly, Thomas' claim for habeas relief on this ground was properly denied.

IV.

We turn next to the issues that the Commonwealth raises on cross-appeal. The District Court granted Thomas sentencing relief because it determined that two of his claims had merit: 1) Thomas' trial counsel was ineffective for failing to investigate and present mitigating evidence, and 2) Thomas' waiver of his right to present mitigating

evidence was not made knowingly and intelligently. *Thomas III*, 388 F. Supp. 2d at 505-11, 513-16. On cross-appeal, the Commonwealth argues that the District Court erred in vacating Thomas' sentence because 1) the District Court applied the wrong standard of review, 2) there is insufficient evidence that Thomas' counsel failed to investigate mitigating evidence, and 3) any deficiency by counsel did not prejudice Thomas.

A.

The Commonwealth claims that the District Court erred in reviewing Thomas' ineffective assistance and waiver claims *de novo* because they were "adjudicated on the merits" by the Pennsylvania Supreme Court, and AEDPA deference pursuant to Section 2254(d) is warranted. We disagree.

It is clear that Thomas raised both the ineffective assistance and waiver claims in state court. On direct appeal, Thomas asserted that he did not waive his right to present mitigating evidence knowingly and intelligently. Indeed, he submitted an affidavit that set out the factual basis for this claim:

> I did not then understand that I could present evidence concerning my character as a mitigating circumstance during the penalty phase. I was under the belief that I could only present

> evidence relating to the circumstances of the offense. This is the reason why I declined to present any testimony at the penalty hearing. . . . At no time did my attorney explain to me that evidence concerning my character could or should be presented for the jury's consideration at the penalty hearing.

In his PCRA petition, Thomas repeated this claim, and added an allegation that counsel was ineffective for failing to investigate and present mitigating evidence that was available at the time of his sentencing.

Even though Thomas raised these claims during the course of the state court proceedings, no state court actually adjudicated them on their merits. The PCRA court and the reviewing Pennsylvania Supreme Court declined to reach the merits of each. Instead, both courts determined that the claims "have previously been decided by [the Pennsylvania Supreme Court] on direct appeal." *Thomas II*, 744 A.2d at 714 & n.3. In reaching that conclusion, both courts were mistaken. First, the Pennsylvania Supreme Court could not have addressed Thomas' ineffective assistance claim on direct appeal because he raised it for the first time in his PCRA petition. Second, on direct appeal, the Pennsylvania Supreme Court never determined whether Thomas knowingly and intelligently waived his right to present mitigating

evidence. On direct appeal, the Pennsylvania Supreme Court addressed only one mitigating evidence issue: whether Thomas understood that he *could* present mitigating evidence. *Thomas I*, 561 A.2d at 710 ("Finally, Appellant complains that his trial counsel did not advise him that *he could put on evidence* of mitigating circumstances and that this omission was prejudicial ineffectiveness." (emphasis added)). But Thomas' waiver claim raised a completely different issue: he asserted that his waiver was not knowing and intelligent because he did not understand the *nature and purpose* of mitigating evidence. Therefore, no state court actually decided the claims that formed the basis of the District Court's decision to grant Thomas habeas relief.

The Commonwealth points out that the Pennsylvania Supreme Court, in reviewing Thomas' PCRA petition, stated that "[t]he issue of the presentation of mitigating evidence, in all its possible manifestations, was determined by this Court's previous decision." *Thomas II*, 744 A.2d at 714 n.3. The Commonwealth urges us to accept the Pennsylvania Supreme Court's statement at face value and view Thomas' claims as "adjudicated on the merits." This we cannot do. For the purposes of determining whether there was an "adjudication on the merits" in state court, what matters most is what the state court actually did, not what it said it did. We cannot blindly accept a court's *ex post* characterization of its prior action when that

characterization is at odds with what we conclude the court's prior action plainly was.

"[I]f an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply." *Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002). Here, the record plainly shows that while Thomas raised the claims at issue in state court, the state courts did not reach their merits. Accordingly, there was no "adjudication on the merits," and the District Court was correct in reviewing the claims *de novo*. *See Appel*, 250 F.3d at 210.

B.

The District Court addressed Thomas' ineffective assistance and waiver claims together, *Thomas III*, 388 F. Supp. 2d at 504, but Thomas' ineffective assistance claim was the focal point of its analysis. First, the District Court concluded that trial counsel was ineffective for failing to investigate and present mitigating evidence. *Id.* at 505-11. Second, the District Court determined that Thomas' waiver of his right to present mitigating evidence did not cure the prejudice caused by counsel's deficiency because the waiver was not made knowingly and intelligently. *Id.* at 513-16. Accordingly, in reviewing the District Court's decision and

the merits of the Commonwealth's cross-appeal, we will concentrate on Thomas' ineffective assistance of counsel claim.

The Commonwealth directs our attention to the evidentiary record that Thomas is obligated to produce in support of his ineffective assistance claim. It points out that courts assessing attorney performance must apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Here, the Commonwealth sees no evidence on the record concerning the extent, if any, of Thomas' counsel's pre-sentencing investigation into mitigating evidence. It argues that, based on such a record, Thomas cannot possibly demonstrate that his counsel was deficient. Accordingly, the Commonwealth asserts that we must deny Thomas' request for habeas relief.

We agree with the Commonwealth that the record is sparse. The only documentary evidence directly pointing to a failure to investigate is a declaration from Thomas' aunt, signed nine years after Thomas' sentencing, that states that no attorney or investigator asked her about Thomas' life and mental health while he was on trial. But Thomas has sought to prove that trial counsel did not investigate, so Thomas' failure to discover evidence of an investigation is itself a sign that none occurred. Therefore, it is entirely appropriate for us to consider what Thomas has looked for, but

cannot find. Here, after Thomas purportedly waived the presentation of mitigating evidence, there was no proffer from counsel identifying the investigative measures he had undertaken, or what evidence he was prepared to present. Additionally, a search of the state court file, where Thomas' court-appointed counsel and the court would have lodged certain case-related documents, yielded nothing suggesting an investigation–no request for a mitigation investigator, no request for funds for a mitigation investigation, no request for a defense mental health expert, and no subpoenas for mental health records. Had Thomas' counsel performed any investigation, we would expect either some mention of it in open court or some "paper trail" suggesting it in the record of proceedings. The absence of both implies that counsel did no investigating.

Nonetheless, from this record, we cannot simply jump to the conclusion that Thomas' counsel was deficient. Counsel's performance enjoys a presumption of effectiveness, and we must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 689-90. "A reviewing court cannot make such a determination on a clean slate." *Marshall*, 307 F.3d at 106. This means that based on the present record, we cannot affirm the District Court's conclusion that Thomas' counsel was deficient at sentencing.

We by no means go so far as to deny Thomas the possibility of relief. This is not the first time we have been asked to determine counsel's effectiveness where "the picture is less than complete." *Id.* In *Marshall*, we also had "no record before us as to what preparation or investigation, if any, was performed by counsel in anticipation of the penalty phase. . . . " *Id.* We therefore "conclude[d] that a District Court hearing is essential, and remand [ed] for a new ruling by the District Court as to *Strickland* based upon a complete record." *Id.* at 117. Likewise, we believe that any resolution of Thomas' *Strickland* claims here is premature without the benefit of an evidentiary hearing. Accordingly, we will remand the case for a hearing concerning the extent, if any, of Thomas' counsel's pre-sentencing investigative efforts to obtain mitig ating evidence.

C.

The Commonwealth urges that an evidentiary hearing would be inappropriate for two reasons: 1) Thomas has failed to develop a factual record in state court, so a hearing would be barred by 28 U.S.C. § 2254(e)(2); and 2) even if counsel were deficient, Thomas cannot prevail because he was not prejudiced. Neither of these arguments are persuasive.

1.

First, Thomas did not "fail[ ] to develop the factual basis of a claim in State court" in such a way that causes Section 2254(e)(2) to bar an evidentiary hearing.[8] "Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000). "Diligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful." *Id.* at 435. In *Thomas v. Varner*, 428 F.3d 491 (3d Cir .2005), we concluded that the petitioner's request for an evidentiary hearing in the state post-conviction court, which was denied, showed sufficient diligence to render Section 2254(e)(2) inapplicable. *Id.* at 498. Likewise, here, Thomas requested an evidentiary hearing in the PCRA court to develop the factual record for his claim that trial counsel failed to investigate mitigating evidence. Therefore, Section 2254(e)(2) does not apply. *See also Williams*, 529 U.S. at 437 ("Diligence will require in

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[8]According to 28 U.S.C. § 2254(e)(2)'s opening clause, "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim . . . ." Sections 2254(e)(2)(A) and (B) list three exceptions to the opening clause, which are not at issue here.

the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law.").

Second, without a fully developed record, we cannot foreclose the possibility that Thomas will be able to show prejudice–a reasonable probability that, but for counsel's deficiency, one juror would have voted to impose a sentence of life imprisonment. *See Bond*, 539 F.3d at 285. In Pennsylvania, the jury must impose a sentence of life imprisonment unless it unanimously finds that the aggravating circumstances outweigh the mitigating circumstances. 42 Pa. Cons. Stat. § 9711(c)(iv). "[E]xtreme mental or emotional disturbance" is specifically listed as a mitigating circumstance that Pennsylvania juries may consider when deciding whether to impose the death penalty. 42 Pa. Cons. Stat. § 9711(e)(2). Here, the Commonwealth does not dispute that even the most cursory search would have yielded evidence of Thomas' long history of mental illness. This history includes a court commitment to a psychiatric hospital when Thomas was sixteen, and a mental health evaluation when he was eighteen that described him as having "responses . . . similar to those in the literature describing paranoid schizophrenia," and "serious mental disturbance." Additionally, had counsel sought to examine Thomas' mental health prior to his sentencing, the results likely would have revealed some mental illness: according to a

court-ordered psychological evaluation conducted the day of Thomas' sentencing,

> [a]t the present time, this Defendant can be best described as suffering from Severe Multiple Personality Disorders, and continues to indicate Sociopathic, Reactive Paranoid, and Schizoid Traits. There is continued indication, both clinically as well as on psychological testing, of a great deal of underlying psychopathology which is clearly focused in the sexual area, with indication of sexual identity confusion, hostility and ambivalence toward women, and indication of very primitive, brittle, and inadequate controls.

Placed in the hands of effective counsel, there is a reasonable probability that this evidence would have persuaded at least one juror to impose life imprisonment rather than the death penalty.

2.

The Commonwealth argues that even assuming that effective counsel would have discovered Thomas' mental health history, no prejudice could have resulted because Thomas would not have let his counsel present any mitigating evidence. The Commonwealth asserts that *Schriro v. Landrigan*, 550 U.S. 465 (2007), and *Taylor v. Horn*, 504 F.3d

416 (3d Cir. 2007), are indistinguishable from the present case and require us to hold that there is no prejudice here. We disagree.

In *Landrigan*, the Supreme Court confronted for the first time "a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." 550 U.S. at 478. There, the petitioner's counsel informed the trial court that he had advised the petitioner "very strongly" that the petitioner should present mitigating evidence. *Id.* at 469. The trial court questioned the petitioner, and the petitioner confirmed that he instructed his counsel not to present mitigating evidence and that he understood the consequences. *Id.* When the petitioner's counsel was proffering, at the court's request, the mitigating evidence he intended to present, the petitioner interrupted multiple times to explain away the mitigating characteristics of the evidence, and also to reaffirm that he did not want the evidence presented in court. *Id.* at 470. Finally, at the end of the sentencing hearing, the petitioner stated that "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." *Id.* Applying AEDPA's deferential standard of review, the Supreme Court determined that the state appellate court reasonably concluded that the petitioner had refused to allow the presentation of mitigating evidence, and this refusal prevented any showing of prejudice. *Id.* at 475-77.

In *Taylor*, the petitioner wrote a confession letter to the police, which stated that "I want the maximum sentence." 504 F.3d at 421. At the petitioner's guilty plea hearing, the petitioner agreed with his counsel's statement that he had instructed counsel not to contact any witnesses or to call any medical personnel who had spoken to him, and that he understood that "the likely result will be imposition of the death penalty." *Id.* At sentencing, the petitioner informed the court that he declined to present any mitigating evidence. *Id.* at 422. The court then sentenced the petitioner to death. *Id.* In the subsequent state post-conviction relief proceedings, the state court conducted an evidentiary hearing, denied the petitioner's request for relief, and found that the petitioner had discussed the possibility of presenting testimony of mitigating circumstances with his counsel, that the petitioner rejected the idea of doing so, and that the petitioner personally called potential witnesses to tell them not to attend his sentencing. *Id.* at 424. The state appellate court affirmed these findings and the court's holding. *Id.*; *see also Commonwealth v. Taylor*, 718 A.2d 743 (Pa. 1998).

Applying AEDPA's deferential standard of review, we determined in *Taylor* that the state post-conviction court's factual and legal conclusions were reasonable. 504 F.3d at 452, 455. Comparing the petitioner to the one in *Landrigan*, we agreed with the petitioner that "he was not belligerent and obstructive in court like the defendant in

Landrigan . . ., but the record shows that his determination not to present mitigating evidence was just as strong." *Id.* at 455. As a result, "whatever counsel could have uncovered, [the petitioner] would not have permitted any witnesses to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence." *Id.*

The Commonwealth claims that like the petitioners in *Landrigan* and *Taylor*, Thomas would have prevented his counsel from presenting any mitigating evidence, no matter what it was, thus obviating any possibility of prejudice. It points to Thomas' conduct at his sentencing for factual support. Yet based on our review of the record, we believe that both *Landrigan* and *Taylor* differ significantly from the present case. As an initial matter, AEDPA deference pursuant to Section 2254(d) constrained federal review in both *Landrigan* and *Taylor*. It does not apply here. *See supra* Part IV.A. This means that while the Pennsylvania courts' determinations of factual issues "shall be presumed to be correct," we review *de novo* the mixed question of law and fact of whether Thomas can show prejudice. *See Appel*, 250 F.3d at 210.

Moving to the merits of the Commonwealth's argument, we cannot conclude that Thomas would have interfered with the presentation of all mitigating evidence. Thomas' colloquy at sentencing

focused narrowly on whether he wanted to take the stand himself:

> [THOMAS' COUNSEL]: Mr. Thomas, you recall during the case in chief that we inquired as to whether or not you wanted to testify on your own behalf. Do you recall that?
>
> [THOMAS]: Yeah, I do. Why do I answer all these questions before? We done be over that already. No, I don't want to get on the stand.
>
> THE COURT: Well, this is a different portion.
>
> [THOMAS]: I still don't want to get on the stand.
>
> THE COURT: Under no conditions?
>
> [THOMAS]: No.
>
> THE COURT: Is this your decision?
>
> [THOMAS]: Yes, it is.
>
> THE COURT: Did you discuss it with your lawyer, Mr. Watson?
>
> [THOMAS]: Yes.

> THE COURT: And you already told him, I would like to repeat, but it's your decision not to take the stand at this penalty stage of the hearing or even to present any evidence. Is that your independent and voluntary decision?
>
> [THOMAS]: It is.

We acknowledge what is plainly of record: the sentencing court did ask Thomas to confirm that "it's your decision not to . . . present any evidence." Yet we cannot ignore that this question was part of a compound question that also asked Thomas to reaffirm that "it's your decision not to take the stand," and the remainder of the questions in the colloquy only concerned Thomas' desire to testify on his own behalf. Accordingly, Thomas' terse answer to this inquiry does not display an intent to interfere with the presentation of mitigating evidence that is strong enough to preclude a showing of prejudice. To us, the only thing that Thomas clearly disclaimed at his colloquy was a desire to testify on his own behalf.

The followup questions asked by the Commonwealth fare even worse. At most, Thomas' responses indicate that he had no witnesses to call at his sentencing:

[THE COMMONWEALTH]: Mr. Thomas, do you have any witnesses that you would like to call at this time at this stage of the proceeding?

[THOMAS]: No.

[THE COMMONWEALTH]: Are you sure about that?

[THOMAS]: No.

[* * *]

THE COURT: You mean no, you don't have any witnesses to call.

[THOMAS]: Right.

[THE COMMONWEALTH]: There is no witness in existence you would like to call, sir, at this time. Yes or no?

[THOMAS]: I said no.

This exchange provides no support for the Commonwealth's argument that Thomas would have prevented the presentation of all mitigating evidence.

Nor does Thomas' refusal to stipulate to his age and education tip the scales in the

Commonwealth's favor. We agree with the Commonwealth that Thomas' age and education are relatively innocuous facts, and Thomas' decision not to stipulate to them is odd. We cannot agree, however, that this proves that Thomas was not prejudiced. While Thomas' refusal to stipulate is consistent with the Commonwealth's position, it is equally consistent with other scenarios that the record supports. Indeed, Thomas has claimed that he did not understand the nature and purpose of mitigating evidence. Thomas' failure to stipulate could be viewed as a symptom of this fundamental misunderstanding, and not as an affirmative declaration against the presentation of all mitigating evidence.

In sum, this case bears no resemblance to *Landrigan* and *Taylor*. Thomas never indicated that he would interfere with or otherwise prevent the presentation of all mitigating evidence, regardless of its nature. At sentencing, Thomas' colloquy focused on two very specific questions: 1) whether he desired to testify on his own behalf; and 2) whether he had any other witnesses to call. That he answered "no" to both does not mean that, had effective counsel prepared mental health evidence, he would have also declined its presentation. Therefore, we cannot conclude that Thomas' con-

duct at sentencing eliminated all possibility that counsel's performance caused him prejudice.[9]

3.

The Commonwealth also argues that Thomas was not prejudiced because the evidence of Thomas' mental health history aggravated more than it mitigated. The Commonwealth points to various negative statements in Thomas' psychological evaluations, including those that described him as having "little understanding of his social and moral responsibility," and as a "sexual deviate with sadistic tendencies." Some of these evaluations even recommended Thomas' incarceration because "he is a serious threat in the community," and "a dangerous criminal." The Commonwealth also notes that certain evaluations documenting Thomas' mental health history referenced two other criminal incidents that the Commonwealth did not introduce at sentencing: 1) in 1975, Thomas sodomized five police horses with a broom handle, killing one of

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[9]In assessing Thomas' ability to show prejudice under *Strickland*, the only question we answer here is whether Thomas would have waived his right to present mitigating evidence had he been represented by effective counsel. As a result, we offer no opinion on whether a waiver of the right to present mitigating evidence must be "informed and knowing." *See Landrigan*, 550 U.S. at 479 ("We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence.").

them; and 2) in 1976, Thomas sexually assaulted an infant girl. As a result, the Commonwealth questions not only whether the inclusion of Thomas' mental health history could have possibly changed the result of his sentencing, but also whether effective counsel would have even introduced any of it for the jury's consideration.

While we agree with the Commonwealth that some of Thomas' mental health history paints him in a negative light, we are not convinced that the death penalty is a *fait accompli* even if evidence of Thomas' mental health history were available at sentencing. Certainly, evidence that Thomas is a sadistic and dangerous sexual deviate who committed at least one prior act that bears resemblance to the crime in this case is not mitigating. Additionally, the quantity of aggravating evidence that the jury already did consider was significant. But Thomas' mental health history acts as a common thread that ties all this evidence together. A single juror may well have believed that this unifying factor explained Thomas' horrific actions in a way that lowered his culpability and thereby diminished the justification for imposing the death penalty. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable . . . to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" (quoting

California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))). Therefore, there exists a reasonable probability that effective counsel would have chosen to present evidence of Thomas' mental health history, and that its presentation would have convinced at least one juror to sentence Thomas to life imprisonment. While Thomas' crimes were heinous, and while it may be that the death penalty was properly imposed, we cannot conclude, on this record, that he was not prejudiced by trial counsel's alleged deficiencies at sentencing.

V.

We agree with the District Court that Thomas cannot prevail on the three claims before us on his appeal, but we disagree with the District Court that Thomas' sentence should be vacated. Although the absence of any evidence of a pre-sentencing investigation in this case seems to suggest that none occurred, it is simply not sufficient to overcome the presumption of effectiveness that we are bound to apply. As a result, we will vacate the District Court's sentencing decision, and remand the case for an evidentiary hearing concerning the extent, if any, of Thomas' counsel's pre-sentencing investigative efforts to obtain mitigating evidence.

App. 53

[EXCERPT]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN THOMAS, Petitioner, v. JEFFREY BEARD, Acting Secretary of Corrections, et al., Respondents.	CIVIL ACTION No. 00-803

OPINION

Pollak, J. August 19, 2005

I.

On February 6, 1986, a jury empaneled in the Court of Common Pleas of Philadelphia County convicted Brian Thomas of murder in the first degree, burglary, involuntary deviate sexual intercourse, and rape. In a separate proceeding, the same jury sentenced Thomas to death. At issue

today is Thomas's federal habeas corpus petition filed pursuant to 28 U.S.C. § 2254. In this petition, Thomas claims that his trial and sentencing hearing were infected with constitutional error, and he seeks release or a new trial, or, at a minimum, a new sentencing hearing.

II.

The evidence adduced at trial discloses the following: On August 9, 1985, at about 7:00 PM, St. Clair Holman, who rented a room in the Philadelphia apartment of Linda Johnson and her boyfriend, Irving Furlow, entered the apartment. On opening the door, Holman saw that the apartment had been ransacked. In his own room, Holman found that his television set, and also a can in which he had approximately $29 in change, were missing. In Linda Johnson's room, her dead body hung face-down on a broken box spring. Johnson's eyes and face were swollen and her nose and right temple were bleeding. There was a bite mark on her cheek, and there were bruises on her arms and thighs. The victim was nude from the waist down, and blood was oozing from her vagina and rectum.

An autopsy revealed that, in addition to the injuries just described, Johnson sustained three fractured ribs, and a twenty-three inch tear reaching from the vagina and diaphragm up into the chest cavity. The autopsy also found that, with the use of a blunt instrument, a shirt had been inserted

into Johnson's rectum, through the intestinal wall and into her abdominal cavity. A blood-encrusted crutch was found near her body. The medical evidence also indicated that the victim was still alive when the shirt was inserted into her rectum. Finally, there was evidence that sperm was deposited in the victim between 5:00 PM and 6:30 PM.

The Commonwealth relied on the evidence summarized above to establish that Linda Johnson was raped, that her death was a homicide, and that the homicide was intentional and malicious. At sentencing, the Commonwealth used the guilt-phase evidence to establish two of the aggravating factors that it invoked, successfully, to support a sentence of death: that the murder was committed during the course of a felony—namely, rape—and that the murder involved torture.

To identify Thomas as the perpetrator, the Commonwealth adduced the following evidence: First, the officer who was first to arrive at the scene of the crime testified that he had seen Johnson with Thomas only two hours before, when he was investigating Johnson's complaint of a stolen purse. Second, Holman testified that he had seen Johnson and Thomas together at 5:45 PM. Third, a friend of Thomas's testified that he had seen Thomas with Johnson at a bar across the street from her apartment during the late afternoon. Fourth, the sperm found in Johnson was deposited

by a non-secretor (i.e., one who does not secrete traces of blood in his body fluid emissions), and Thomas's blood was analyzed and typed to be that of a non-secretor. Fifth, blood found on his boxer shorts was determined to be human blood. Sixth, an impression of Thomas's teeth fit with the bite mark left on Johnson's cheek. Finally, the television set and $29 taken from Holman's room were found in Thomas's possession.

The judge presiding at trial and sentencing was the Honorable Edwin Malmed. Thomas was represented by court-appointed counsel. On February 6, 1986, a jury found Thomas guilty of murder in the first degree, rape, involuntary deviate sexual intercourse, and burglary.

At the penalty phase that followed later in the day, the Commonwealth relied upon three aggravating factors. Two of these–killing in the course of another felony, and torture–have been referred to above. The third aggravating factor was a significant history of violent felony convictions, *see* 42 Pa.C.S. § 9711(d)(6),(8),(9). To establish the third aggravating factor, the Commonwealth invoked (1) Thomas's 1978 conviction for felonious aggravated assault and indecent assault on a three-year old who suffered injuries to his rectum and intestines, and (2) Thomas's 1984 conviction for criminal trespass, wherein Thomas had unlawfully entered the home of a neighbor and then climbed into bed with her while she was sleeping.

At the start of the penalty phase, counsel for Thomas advised the court, in the absence of the jury, that his client would present no mitigating evidence. The court ruled that Thomas should be colloquied regarding his decision to forego mitigating evidence, and Thomas was then questioned about his decision. Immediately following the colloquy, the prosecution offered to stipulate to Thomas's age and to the fact that he had a high school diploma, but Thomas, through counsel, declined the offer.

The jury found the three proposed aggravating factors and no mitigating factors, and it voted death. Thomas's post-verdict motions were argued and denied, and the trial court sentenced Thomas to death on the first-degree murder conviction, and to consecutive terms of imprisonment for a maximum of fifty years for the burglary, rape and involuntary deviate sexual intercourse convictions.

On June 17, 1989, the Pennsylvania Supreme Court issued its opinion in Thomas's automatic direct appeal, *see* 42 Pa.C.S. § 9711(h)(1). Thomas, via a new court-appointed attorney, challenged the sufficiency of the guilt-phase evidence, and contested the evidence underpinning the aggravating factors found by the jury in the penalty phase. As to the guilt phase, Thomas argued that the burglary conviction was improper because the evidence suggested that his entry into Johnson's apartment was authorized; that the evidence was

insufficient to support his conviction for involuntary deviate sexual intercourse; that there was no evidence that he penetrated Johnson and hence that his rape conviction was improper; that it was prejudicial to admit testimony from the medical examiner that Johnson would have experienced pain as a result of the insertion of the shirt into her rectum; and that a hatchet found at the murder scene should not have been admitted into evidence. Regarding his sentence, Thomas argued that the evidence did not support a finding that the murder was committed *during* the course of the burglary, rape or involuntary deviate sexual intercourse; that the crime of criminal trespass did not constitute a prior *violent* felony; that the court's torture instruction was improper; and that there was insufficient evidence to support a finding of torture. The Commonwealth argued that none of Thomas's claims had been raised in post-verdict motions, and so these were waived. The Pennsylvania Supreme Court rejected the Commonwealth's waiver argument, noting that "in death penalty cases, we relax the waiver rule at times and address the merits of arguments raised for the first time in the direct appeal to this court." *Commonwealth v. Thomas*, 561 A.2d 699, 704 (1989) (*Thomas-I*). On addressing the merits, the court sustained the convictions and the death sentence.

In 1992, Thomas sought collateral relief from his convictions and sentence by filing a petition under Pennsylvania's Post-Conviction Relief Act,

42 Pa.C.S.A. § 9541 *et seq.* (hereinafter "PCRA"). Thomas was represented by yet another court-appointed attorney. Thomas's amended PCRA petition expressly acknowledged the federal constitutional underpinning of Thomas's claims, stating that Thomas's waiver of the right to present mitigating evidence was constitutionally deficient, and that trial and appellate counsel's performance was ineffective in violation of the Fourth, Fifth, Sixth, and Eighth Amendments of the Constitution.

Thomas's PCRA counsel requested an evidentiary hearing, but the Court of Common Pleas, sitting as the PCRA court, denied the request, having determined that a decision could be made from the existing record. *Commonwealth v. Thomas*, No. 2716 (Pa. Commw. Ct., 1st Jud. Dist., Sept. 13, 1995). The PCRA court noted that Thomas would not be entitled to review of any claim that had been previously litigated or waived, but it nonetheless considered the merits of each claim of error, and, in an opinion of September 13, 1995, found them all to be wanting, and hence denied PCRA relief.

In his appeal from the denial of PCRA relief, Thomas's PCRA counsel was joined by another attorney, then of the Center for Legal Education, Advocacy, and Defense Assistance and now of the Capital Habeas Unit of the Federal Defenders Association, who is one of Thomas's current habeas counsel. The PCRA appeal brief raised twenty-three claims of error, and argued that, in light of

the Pennsylvania Supreme Court's policy of relaxing the waiver bar in death penalty cases, all of these claims of error were properly before the court. Twenty-one of the twenty-three claims in Thomas's PCRA appeal brief appear in his habeas petition. For the sake of brevity, Thomas's claims are listed in the form and order in which they appear in the habeas petition; the number by which each claim was designated in the PCRA appeal brief appears in arabic numerals in parentheses following each claim below:

> Claim I (Claim 1 in PCRA appeal brief)–Trial counsel was ineffective for failing to investigate, develop and present mitigating evidence concerning Thomas's background and longstanding mental illness;
>
> Claim II (Claim 6)–Thomas was not competent to waive his right to present mitigating evidence and his waiver was not knowing, intelligent and voluntary;
>
> Claim III (Claims 4 and 5)–Trial counsel was per se ineffective;
>
> Claim IV (Claim 2)–The trial court erred when, after receiving the Pre-Sentence Investigation Report, which stated that Thomas suffered from

psychological impairments, the court failed to order an investigation into Thomas's competency to waive his right to present mitigating evidence;

Claim V (Claim 3)–Thomas was denied due process of law if his counsel was not provided with the Pre-Sentence Investigation Report, and there is no indication in the record that counsel did receive that report;

Claim VI (Claim 7)–The trial court's instruction on the torture aggravating circumstance was vague, overbroad and erroneous;

Claim VII (Claim 8)–The prosecutor engaged in misconduct during the guilt phase by invoking his own expertise, referring to the sentencing phase, and speculating as to the victim's pain and suffering;

Claim VIII (Claim 9)–The prosecutor engaged in misconduct at the sentencing phase by invoking his own experience, referring to Thomas's future dangerousness, and appealing to the Bible;

Claim IX (Claim 14)–The trial court erred in failing to instruct the jury that life imprisonment entailed no possibility of parole;

Claim X (Claim 10)–The prosecutor engaged in misconduct when he threatened Thomas's wife during the course of the trial;

Claim XI (Claim 11)–The trial court erred in admitting the inherently suspect testimony of an expert in bite-mark identification;

Claim XII (Claim 12)–Thomas's prior non-violent convictions for defiant trespass and criminal trespass were improperly used to establish a significant history of prior violent felony convictions;

Claim XIII (Claim 13)–Thomas's conviction and sentence are unreliable because one of the jurors had a hostile relationship with Thomas's wife when the two were in high school;

Claim XIV (Claim 15)–The penalty phase jury instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988);

Claim XV (Claim 16)–Thomas's due process rights were violated because the jury was death-qualified but not life-qualified;

Claim XVI (Claim 17)–The trial court erred at the guilt phase in defining "reasonable doubt" as a doubt that would cause one to "restrain from acting"–a formulation that lessened the prosecution's burden of proof;

Claim XVII (Claim 18)–The trial court erred in failing to provide the jury with any "reasonable doubt" instruction at the penalty phase, relying instead upon the faulty "reasonable doubt" instruction given at the guilt phase;

Claim XVIII (Claim 19)–The trial court's instruction regarding the meaning of the "preponderance of the evidence" standard by which Thomas had to establish mitigating evidence was inadequate;

Claim XIX (Claim 21)–Trial counsel was ineffective for failing adequately to cross-examine St. Clair Holman, failing to call additional witnesses who could have established that the victim's boyfriend was the perpetrator,

and failing to object to the introduction into evidence of Holman's hatchet;

...

Claim XXIII (Claim 23)–Thomas is entitled to a new trial and sentencing proceeding because the prejudicial effect of the cumulative errors in this case undermines confidence in the verdict and sentencing.

In addition to the claims listed above, the PCRA appeal brief advanced the following claims:

Claim 20–Trial counsel was ineffective for failing to conduct any crime scene investigations, obtain expert testimony, object to the illegal seizure of Thomas's teeth impressions, or litigate in suppression the overly suggestive identification of Thomas by St. Clair Holman;

Claim 22–A remand to the Court of Common Pleas was required for an evidentiary hearing on the location of sketches used by the prosecution at trial, so that these sketches could be

compared to prejudicial photographs of the victim introduced at trial.[1]

On January 18, 2000, the Pennsylvania Supreme Court rendered its opinion. *Commonwealth v. Thomas*, 744 A.2d 713 (Pa. 2000) (*Thomas-II*). It considered the following claims to be previously litigated because it had decided these on direct appeal, and it thus declined to review these claims again: Trial counsel was ineffective for failing to investigate or present mitigating evidence (Claims 1 and 5 of Thomas's PCRA appeal brief, which became Claims I and III of his habeas petition); at the penalty phase, the trial court gave an inappropriate instruction regarding torture (Claim 7, which became Claim VI of Thomas's habeas petition); Thomas's prior conviction for criminal trespass should not have formed the basis of a finding that he had a significant history of violent felony offenses (Claim 12, which is also Claim XII of Thomas's habeas petition); defense counsel was ineffective for failing to object to the admission of a hatchet (a portion of Claim 21, which became Claim XIX of Thomas's habeas petition); and Thomas was denied counsel altogether at the penalty phase since his counsel did not present any evidence in mitigation (Claim 4, which became Claim III of

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[1]The habeas petition contained three other claims not present in the PCRA appeal brief. These are presented below, *see infra* Part III.

Thomas's habeas petition). *See generally Thomas-II*, 744 A.2d at 714 n.3.

The court found that the majority of the remaining claims were waived and, pursuant to 42 Pa.C.S. § 9543(a)(3),[2] it declined to review these as well. More specifically, the court found that the following claims were waived because they were raised for the first time in Thomas's PCRA appeal brief: Claim 2 (Claim IV), Claim 3 (Claim V), Claim 13 (Claim XIII), Claim 14 (Claim IX), Claim 17 (Claim XVI), Claim 18 (Claim XVII), Claim 19 (Claim XVIII), so much of Claim 8 as contended that it was prosecutorial misconduct for the prosecutor to refer to the sentencing phase during the guilt phase (relevant portions of Claim VII), Claim 10 (Claim X), and Claim 23 (Claim XXIII). *See generally Thomas-II*, 744 A.2d at 715 n.4. In addition, the court found that other claims had been waived because they alleged ineffectiveness of trial counsel, but not appellate counsel, even though they were raised for the first time in Thomas's amended PCRA petition: Claim 6 (Claim II), Claim 11 (Claim XI), Claim 16 (Claim XV), so much of Claims 8 and 9 as referred to the prosecutor's improper invocations of his own experience (relevant portions of Claims VII and VIII, respectively),

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[2] 42 Pa.C.S. § 9543(a)(3) provides that, "[t]o be eligible for relief under [the PCRA], the petitioner must plead and prove by a preponderance of the evidence" that "the allegation of error has not been previously litigated or waived."

so much of Claim 8 as referred to the prosecutor's statements about the victim's pain and suffering (relevant portions of Claim VII), and so much of Claim 9 as referred to the prosecutor's statements about Thomas's future dangerousness (relevant portions of Claim VIII). *See generally Thomas-II*, 744 A.2d at 715 n.4.

The court addressed the merits of Claim 15 (Claim XIV), which stated that counsel was ineffective for failing to object to the court's penalty phase instructions. More specifically, Thomas there argued that the instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), because they failed to inform the jury that it was not required unanimously to find mitigating circumstances. Because *Mills* had not been decided at the time of Thomas's trial, the court rejected the contention that counsel was ineffective for failing to object to the trial court's instructions.

The court rejected Claim 20 (not raised in Thomas's habeas petition) on the ground that Thomas had either failed to establish the deficiency of the various omissions attributed to trial counsel, or had failed to establish prejudice as a result of those omissions.

The court also rejected the portions of Claim 21 that had not been previously litigated. These alleged that counsel was ineffective for failing adequately to cross-examine Holman, failure to call

other witnesses whose testimony might have raised an inference that the victim's boyfriend was the murderer, and failure to object to the admission in evidence of a hatchet. The Pennsylvania Supreme Court found that trial counsel's decisions were reasonable and hence did not amount to a deficient performance.

Finally, the court dismissed as frivolous Claim 22 (not raised in Thomas's habeas petition), which requested a remand to the Court of Common Pleas for an evidentiary hearing on the location of sketches used by the prosecution at trial. Thomas's counsel sought these sketches in order to compare them with allegedly prejudicial photographs of the victim introduced at trial after counsel "opened the door." The court reasoned that the photographs were themselves a part of the record and had been made available to Thomas's counsel, and that an evaluation of their potential to prejudice the jury could be made without comparing them to the prosecution's sketches.

Having found that the bulk of the issues raised by Thomas had been previously litigated or waived, and that the remainder were meritless, the Pennsylvania Supreme Court affirmed the Court of Common Pleas' denial of Thomas's PCRA petition.

III.

As noted above, in addressing Thomas's appeal from the Court of Common Pleas' denial of Thomas's PCRA petition, the Pennsylvania Supreme Court found that the majority of his claims had either been previously litigated or had been waived, and hence the court did not examine their merits. Of the twenty-three claims raised in Thomas's petition for federal habeas corpus relief, only two of these–Claim XIV (which was Claim 15 in Thomas's PCRA appeal), a claim alleging a violation of *Mills v. Maryland*, 486 U.S. 367 (1988), and Claim XIX (Claim 21 in Thomas's PCRA appeal), a claim alleging ineffective assistance for failing to (a) adequately cross-examine Holman, (b) call certain witnesses, and (c) object to admission into evidence of a hatchet–were addressed on the merits by the Pennsylvania Supreme Court when it heard Thomas's PCRA appeal. Of the remaining claims, Claims I, III, VI and XII of his habeas petition, as well as Claim XIX to the extent it deals with admission of a hatchet into evidence, were deemed previously litigated, *Thomas-II*, 744 A.2d at 715 n.3, and claims II, IV, V, VII, VIII, IX, X, XI, XIII, XV, XVI, XVII, XVIII, and XXIII were deemed waived, *Thomas-II*, 744 A.2d at 715 n.4.

Three claims not raised in Thomas's PCRA appeal are presented in Thomas's habeas petition. These claims are as follows:

> Claim XX–The trial court erred in permitting testimony during the guilt phase regarding torture of the victim;[3]
>
> Claim XXI–Trial counsel was ineffective for failing to object to the testimony of the Commonwealth's hair expert;
>
> Claim XXII–The trial court erred at the penalty phase in permitting two police officers to testify to the inflammatory details of Thomas's prior convictions.[4]

A.

The Third Circuit outlined the scope of review of § 2254 habeas petitions in *Lines v. Larkins*, 208 F.3d 153 (3d Cir. 2000):

> Petitioners who have not fairly presented their claims to the highest state court have failed to exhaust those claims. If, however, state

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[3]This claim was raised, and its merits were considered, by the Pennsylvania Supreme Court in its direct review of Thomas's convictions and sentence. *See Thomas-I*, 561 A.2d at 706-707. This claim is thus exhausted.

[4]Thomas has subsequently withdrawn this claim.

> procedural rules bar a petitioner from seeking further relief in state courts, the exhaustion requirement is satisfied because there is "an absence of available State corrective process." 28 U.S.C. § 2254(b). Even so, this does not mean that a federal court may, without more, proceed to the merits. Rather, claims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner establishes "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the default.

Id. at 160 (internal citations omitted).

A claim "deemed exhausted because of a state procedural bar," *id.*, is not open to examination on federal habeas if the state procedural bar is not a procedural rule constituting "an independent and adequate state ground barring our review of a federal question," *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982). But, "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Id.* at 262-63 (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)).

Thus, a federal court may exercise jurisdiction over a procedurally defaulted claim if any one of three circumstances holds–first, where the default is *caused* by circumstances outside of the petitioner's control and the petitioner suffers *prejudice* therefrom; second, where adherence to the state procedural rule will result in a *fundamental miscarriage of justice*; and third, where the state procedural rule is not adequate because it is not "firmly established, readily ascertainable, and regularly followed," *Szuchon v. Lehman*, 273 F.3d 299, 325 (3d Cir. 2001).

B.

Thomas faces three potential sources of procedural default–a bar against previously litigated claims, 42 Pa.C.S. § 9543(a)(3); a bar against waived claims, *id.*; and a statute of limitations, 42 Pa.C.S. § 9545(b).

Previously Litigated Claims

To be eligible for relief under the PCRA, "the petitioner must plead and prove by a preponderance of the evidence" that "the allegation of error has not been previously litigated...." 42 Pa.C.S. § 9543(a)(3). Further, 42 Pa.C.S. § 9544(a) provides that an issue has been previously litigated if:

> (1) Deleted.[5]
>
> (2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or
>
> (3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

In Thomas's PCRA appeal opinion, the Pennsylvania Supreme Court stated that a number of Thomas's claims–the claims that in the habeas petition are I, III, VI, XII, and a portion of XIX–had "previously been decided by this Court on direct appeal; therefore, those claims will not be reviewed." *Thomas-II*, 744 A.2d at 714.

Claims I, III, and XII

The claims deemed previously litigated by the Pennsylvania Supreme Court are reproduced in Thomas's habeas petition as Claims I, III, VI, XII, and a portion of Claim XIX. Claims I and III allege

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[5]Clause (1) had not yet been deleted at the time of Thomas's initial PCRA proceeding. At that time, the provision stated that "an issue has been previously litigated if: (1) it has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal; ...." 42 Pa.C.S. § 9544(a)(1).

ineffectiveness of counsel for counsel's failure to investigate or present mitigating evidence. In disposing of these claims in Thomas's PCRA appeal, the Pennsylvania Supreme Court stated that "[t]he issue of the presentation of mitigating evidence, *in all its possible manifestations*, was determined by this Court's previous decision." *Thomas-II*, 744 A.2d at 714 n.3 (emphasis added). Taking the Pennsylvania Supreme Court at its word, then, it is apparent that Claims I and III are not procedurally defaulted; instead, these claims have been fully exhausted.[6] Similarly, the

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[6]Despite the Pennsylvania Supreme Court's statement that "all [ ] possible manifestations" of claims alleging ineffectiveness of counsel for a failure to present mitigating evidence had been determined by the Court on direct appeal, 744 A.2d at 714 n.3, it seems appropriate to observe that the scope of the ineffectiveness claims raised on direct appeal does not appear to be coextensive with the scope of the ineffectiveness claims raised in Thomas's PCRA appeal brief. In his PCRA appeal brief Thomas argued that counsel was ineffective for failing to investigate or present evidence relating to his extensive mental health history. To this end, Thomas reproduced excerpts from three psychological evaluations that Thomas had undergone prior to Johnson's murder, *see* Thomas's PCRA Appeal Br. at 8-14, and he appended five such reports, *see* Ex. 2-5 to Thomas's PCRA Appeal Br. By contrast, no mention of Thomas's mental health history was made in Thomas's direct appeal brief. Instead, to the extent that Thomas's direct appeal brief alleged ineffective assistance for failing to present mitigating evidence, it focused exclusively on Thomas's relatively young age, his attainment

(continued...)

substance of Claim XII was the same in Thomas's direct appeal brief and his PCRA appeal brief. Thus, this claim also received review on the merits. Accordingly, Claims I, III, and XII are properly before this court.[7]

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[6](...continued)
of a high school diploma and hairdressing certificate, and the availability of his family members who would have testified to Thomas's good-natured character and his close family. Indeed, while the direct appeal brief includes affidavits from five members of Thomas's immediate family, these are remarkable in their uniform silence regarding Thomas's history of mental illness and the deviant, criminal conduct stemming therefrom. *See generally* Appellant's Br. for Direct Appeal, Aug. 8, 1988, at 28-31, and accompanying appendix.

Because the failure to investigate or present mitigating mental health evidence presents a substantially different aspect of the claim of ineffective assistance than does the claim alleging a failure to investigate or present mitigating evidence relating to a defendant's age, educational attainments, or general character traits, it does not appear that the Pennsylvania Supreme Court could be said to have actually addressed the merits of Claims I and III on direct appeal. However, as suggested in the text, it would seem that this habeas court, in determining whether claims have been exhausted, should accept the authoritative statement of Pennsylvania's highest court as to what issues that court addressed at an earlier stage of the litigation.

[7]*Compare Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) ("[T]he later state decision rests upon a prohibition against further state review–for example, an unexplained denial of state habeas resting in fact upon a rule ...
(continued...)

* * * * *

IV.

This opinion now turns to the merits of Thomas's numerous claims. It treats together Claims I and II, which allege respectively that trial counsel was ineffective for failing to investigate or present mitigating evidence, and that Thomas's waiver of the right to present mitigating evidence was not knowing, intelligent, or voluntary. The remaining claims are addressed separately, in the order presented in Thomas's petition.

Claim I–Failure to investigate and present mitigating evidence; and Claim II-Absence of a knowing, intelligent, and voluntary waiver of the right to present mitigating evidence

Thomas contends trial counsel's failure to investigate and present mitigating evidence at sentencing regarding his mental health constituted ineffective assistance of counsel.

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[7](...continued)
preventing the relitigation on state habeas of claims raised on direct appeal. In that circumstance, ... its effect upon the availability of federal habeas is nil...."); *Barclay v. Fla.*, 463 U.S. 939, 946 (1983) ("Since the Florida Supreme Court held that it had considered Barclay's claims in his first appeal, and simply refused to reconsider its previous decision in the second appeal, those claims are properly before us.").

Claims of ineffective assistance of counsel are evaluated under the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on such a claim, Thomas must show both deficient performance of counsel, based on an objective standard of reasonableness, and prejudice as a result of such deficiency, such that confidence in the result of the original sentencing proceeding is undermined. *Id.* at 694.

A.

Although the Supreme Court's recent ruling in *Rompilla v. Beard*, 545U.S. 374, 125 S.Ct. 2456 (2005), sheds further light on precisely what is required of counsel, the duty to investigate potentially mitigating evidence was already well established as a requirement of *Strickland*. *See Marshall v. Hendricks*, 307 F.3d 36, 99-107 (3d Cir. 2002). Quoting with approval from Justice Brennan's concurring opinion in *Strickland*, the Third Circuit in *Hendricks* held that

> [the] right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing. Accordingly, counsel's general duty to investigate takes on supreme importance to a defendant in

> the context of developing mitigating evidence to present to a judge or jury considering the sentence of death.

307 F.3d at 99 (quoting *Strickland*, 466 U.S. at 706 (Brennan, J., concurring) (internal quotation omitted)) (alteration in original). Further interpreting this duty, the Supreme Court recently held that this investigation "'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(C), p. 93 (1989)).

Although much is expected of trial counsel, it is also true that *Strickland* calls for great deference to attorneys' decisions not to carry out a particular investigation, and for a general presumption of reasonableness of attorneys' actions, particularly in the absence of a record on which to judge counsel's performance. 466 U.S. at 690. In assessing reasonableness, "hindsight is discounted by pegging inadequacy to 'counsel's perspective at the time' investigative decisions are made." *Rompilla*, 125 S.Ct. at 2462 (quoting *Strickland*, 466 U.S. at 689). There is no bright-line rule concerning the extent of an investigation–how far an attorney must go is largely based on context. "A court must consider not only the quantum of evidence already known to

counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Id.* at 533.

Even more important here is *Strickland's* holding that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.... And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* at 691. However, the Supreme Court in *Rompilla*, noting that "we long have referred [to ABA standards] as guides to determining what is reasonable," 125 S.Ct. at 2466 (internal quotation omitted), was at pains to quote the following ABA standard relating to counsel's duty to investigate:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession

> of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

1 ABA Standards for Criminal Justice: Prosecution Function and Defense Function 4-4.1 (2d ed. 1982 Supp.).

In addition, courts interpreting *Strickland* have held that there comes a point when a defendant's actions should signal the need for further investigation by counsel. The Third Circuit has recently made this obligation clear, specifically instructing that, in the context of mental health evidence, certain aspects of a defendant's behavior, regardless of whether the defendant himself provides any information, should alert an attorney that a potentially mitigating condition exists. *See Jacobs v. Horn*, 395 F.3d 92, 101-103 (3d Cir. 2005) ("At the time counsel decided not to investigate further, he knew or should have known from Jacobs' behavior and from his interactions with Jacobs that he should initiate some investigation of a psychological or psychiatric nature."). This remains the case when a defendant refuses to contribute to his own case, or even where a defendant actively obstructs counsel's performance. *See Rompilla*, 125 S.Ct. at 2462.

In the instant case, there is no evidence that trial counsel (a) obtained mental health records pertaining to Thomas's past offenses and treatment; (b) sought out, fully interviewed, and presented helpful testimony from family members and others familiar with Thomas's background; or (c) worked with a mental health expert to examine Thomas and present testimony regarding mental health-related mitigating circumstances. Had such inquiries been made, trial counsel would have been able to present an extensive clinical record–both documentary and testimonial–of a long history of mental illness, including repeated diagnoses of paranoid schizophrenia and an inability to control aggressive impulses.[14] In light of the clear duty of

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[14]For example, a psychological evaluation from June 23, 1976, following Thomas's conviction for the sexual assault of an infant girl, stated that Thomas has "very poor control over aggressive impulses which may lead to explosive, impulsive behavior at any time." Evaluation of Eva Wojciechowski, Ex. M. At 1. A follow-up evaluation, performed in September, 1977, stated that personality tests "reveal[ed] serious mental disturbance." Evaluation of Iris Jourdan, Ex. I at 3. The evaluation explained that "[w]hat happens in serious mental illness is that sometimes unconscious tendencies slip out. In Brian[Thomas's] case, this is the probable cause of the sex crimes." *Id.* at 2. An earlier evaluation conducted at Pennsylvania Hospital's Hall-Mercer Center, to which Thomas was admitted following his assault of a horse, diagnosed Thomas with "Passive-Aggressive Personality" and stated that he has "a great deal of difficulty with his aggression and anger." Evaluation of Dr. Dwight Ashby, Ex.

(continued...)

defense counsel to investigate such matters, reiterated most recently in *Rompilla*, the failure of Thomas's counsel to do so does rise to the level of a *Strickland* deficiency. *See also Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (failure to inquire into various aspects of defendant's background, including possible mental handicap); *Jacobs*, 395 F.3d at 103 (failure to obtain medical records demonstrating mental deficiencies).

Affidavits from Thomas's family members state that counsel never interviewed them, even though these family members were ready and willing to testify on Thomas's behalf, particularly concerning Thomas's acts of kindness toward others and the close relationship he enjoyed with his family members. Further, some of the affidavits describe the manifestations of Thomas's mental illness, including his severe mood swings and inability to distinguish the imaginary from reality. *See generally* Ex. D; Ex. H of Suppl. Filing. All of this testimony would have been pertinent to a mitigation case. *See* 42 Pa.C.S. § 9711(e)(2), (3), and (8)

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[14](...continued)
L. at 2. Finally, the findings reported in these evaluations are consistent with those made by Lawrence Byrne, who evaluated Thomas on the day that the jury handed down its verdict in the Linda Johnson case. Byrne described Thomas "as suffering from Severe Multiple Personality Disorders," and continuing to exhibit "Sociopathic, Reactive Paranoid, and Schizoid traits." Report of Lawrence Byrne, Ex. K at 4.

(listing, respectively, as mitigating factors, "[that] the defendant was under the influence of extreme mental or emotional disturbance," "[that] [t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," and "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."). More importantly, counsel was aware of some of Thomas's own actions indicating questionable mental health, not the least of which were Thomas's post-arrest suicide attempt and statements by Thomas that he wanted to die. But, despite this knowledge, counsel failed to assemble the substantial, documented, record of Thomas's history of mental problems, and failed to even go so far as obtaining his own mental health examination of his client. *See Rompilla*, 125 S.Ct. at 2463. As *Jacobs* and *Rompilla* suggest, given the stakes of this case and the availability of information should counsel have sought it, the failure to do so amounts to a failure to exercise reasonable judgment.

It is true that in *Rompilla*, not only were the records counsel failed to discover publicly available, but the prosecution had specifically notified defense counsel that it was going to use these particular records as part of its case at sentencing. In the instant case, the mental health evidence Thomas's counsel might have presented was not in direct response to anything the prosecution had planned

to introduce, and the information was not as easily accessible (i.e., in a public file in the same building as the current trial) as was the information concerning Rompilla's past convictions. In addition, Thomas was not simply uncooperative with counsel–he expressly told counsel that he did not wish to present mitigating evidence. However, Thomas's counsel was nonetheless aware of the prosecution's intention to argue the existence of several aggravating factors, and thus of the need to respond in order for there to be any hope of avoiding a death sentence. All of the pertinent information, including a series of mental health evaluations and a statement following Thomas's suicide attempt while in custody, was readily available for counsel to discover with minimal effort. And, as discussed in section D, *infra*, Thomas was never adequately informed and thus was not truly aware of what he was foregoing by choosing not to present such evidence. Under the circumstances, any waiver of the right to present mitigating evidence was not made knowingly.

It is against this background that we must assess trial counsel's duty, using the controlling professional standards of the time as a guide to evaluating the reasonableness of counsel's actions. In addition to the text quoted at page 29, *supra*, the commentary accompanying the ABA Standards for Criminal Justice identifies the principles underlying the duty to investigate.

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, *mental and emotional stability*, family relationships, and the like, will be relevant.... *Investigation is essential to fulfillment of these functions....* The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; *without careful preparation, the lawyer cannot fulfill the advocate's role.*

Commentary, 1 ABA Standards for Criminal Justice 4-4.1 (2d ed.1980) (emphasis added). Here counsel's deficient performance was not due to any pursuit of a particular trial strategy–there was simply no investigation at all, and thus no foundation on which to base any strategic choice. *See United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) ("counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made."); *Blystone v. Horn*, No. 99-490, slip op. at 120 (W.D.

Pa. March 31, 2005) ("trial counsel's failure to obtain records from [defendant's] background or request expert mental health assistance was not based on any tactical decision. Rather, it resulted from his inadequate preparation.").

Although the circumstances of every case might not call for a thorough investigation in all respects, if counsel chooses not to investigate certain matters, he must at least "make a reasonable decision that makes particular investigation unnecessary." *Strickland*, 466 U.S. at 691. A ruling by Judge Van Antwerpen, while still a member of this court, helps to illuminate how such a decision should be evaluated.

> Because the post-trial evaluations show that mental health evidence existed prior to trial, both a complete failure to investigate and a partial investigation that failed to uncover such evidence must be considered unreasonable because counsel probably would have discovered such evidence had his investigation been reasonable.... Likewise, because such evidence probably would have been discovered, counsel's decision not to make such an investigation, if indeed he made such a decision, must be considered unreasonable.

Holloway v. Horn, 161 F.Supp.2d 452, 567-68 (E.D. Pa. 2001), *rev'd on other grounds*, 355 F.3d 707 (3d Cir. 2004). The fact that Thomas may have directed counsel not to present mitigating evidence, even assuming, *arguendo*, that such direction was made knowingly (but see section D, *infra*), does not render reasonable counsel's decision not to investigate. As ABA guidelines indicate, "The investigation for preparation of the sentencing phase should be conducted *regardless of any initial assertion by the client that mitigation is not to be offered.*" ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(C) (emphasis added).

Thus, while "'[t]he right to counsel does not require that a criminal defense attorney leave no stone and no witness unpursued[,]' the Sixth Amendment 'does require a reasoned judgment as to the amount of investigation the particular circumstances of a given case require.'" *Blystone*, slip op. at 121 (quoting *Jermyn v. Horn*, 266 F.3d 257, 308 (3d Cir. 2001)). As the case law and the controlling ABA standards indicate, effective representation necessitates not only the investigation of potentially mitigating evidence, but also the presentation of such evidence, particularly to rebut aggravating evidence presented by the prosecution. *See Rompilla*, 125 S.Ct. at 2465-2466. The Commonwealth argues that the silence of the record renders Thomas's ineffective assistance claim groundless, as Thomas cannot prove that his

counsel did not investigate. While it is true that the record here is devoid of any affidavit or other recital by trial counsel of his particular efforts (or lack thereof), there is also nothing in the record to indicate that any investigation or independent mental health evaluation did occur–a notable omission, given the paper trail or other on-the-record indication(s) such investigation would be likely to leave behind. More importantly, even if one assumes, *arguendo*, that counsel did investigate and discover the available mental health evidence, his failure to present such evidence or at least to use such evidence as the basis for obtaining the defense's own mental health evaluation constitutes an independent basis for a finding of deficient performance.

Given the prevailing professional standards, trial counsel's failure to investigate and/or present the available mental health records and evaluations, along with counsel's failure to obtain and present any independent mental health evaluation or examination, constituted deficient performance.[15] The next step of the *Strickland* inquiry is

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[15]The Commonwealth suggests there is not enough evidence in the record to determine whether counsel was truly ineffective, and that, furthermore, this court is precluded from holding an evidentiary hearing to determine additional facts. Because the evidence on the record is sufficient to demonstrate a Sixth Amendment violation, there is

(continued...)

to determine whether counsel's deficient performance prejudiced Thomas.

B.

To establish prejudice under *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. However, *Strickland* does emphasize the "strong presumption of reliability" of the criminal process. 466 U.S. at 696. A court should only be concerned with "whether ... the result of the particular proceeding is unreliable because of a breakdown in the adversarial process." *Id.* A "verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.*

Specifically, a defendant does not need to show that it is more likely than not that counsel's deficiencies altered the outcome of the trial. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999) ("This

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[15](...continued)
no need to hold an evidentiary hearing. It is therefore unnecessary for this court to decide whether such a hearing is available under the AEDPA and the controlling case law.

standard is not a stringent one. It is less demanding than the preponderance standard."). In applying this standard, it is important to take into account whether the state requires unanimity for conviction and/or imposition of the death penalty, as this might further influence precisely what is necessary to demonstrate prejudice. *See Hendricks*, 307 F.3d at 103.

Here we have a case where the jury unanimously found three aggravating factors–commission of a murder during a felony, a significant history of felony convictions, and commission of murder by means of torture. In light of these factors, as well as the mountain of evidence of Thomas's guilt and the extremely brutal nature of his crime, it is possible that the introduction of evidence of Thomas's mental health might have had little or no effect on the jurors' sentencing decision. However, the absence of such evidence made it impossible for the jury to assess whether Thomas was "under the influence of extreme mental or emotional distress" or was "unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," two of the several potential mitigating factors the jury could find. *See* Petitioner's Exhibit O, First Degree Murder Verdict: Penalty Determination Sheet.

While one cannot, of course, know what effect the undiscovered evidence of Thomas's mental history would have had on the jury had

counsel gathered and presented the evidence, it is reasonably probable that, for a single juror, such evidence could have been powerful enough to affect his or her sentencing decision. *See Wiggins*, 539 U.S. at 534. The Third Circuit recently addressed this issue in *Jermyn*, in which the jury imposed a sentence of death after finding that the one aggravating factor proved by the prosecution outweighed three mitigating factors. Because of the delicate weighing of evidence the jury employed, the court there held that the failure of counsel to present additional evidence bolstering these mitigating factors was prejudicial. 266 F.3d at 309. "Because the jury's decision must be unanimous, [defendant] can show prejudice in this case if there is a reasonable probability that the presentation of the [evidence] ... would have convinced one juror to find the mitigating factors to outweigh the single aggravating factor the Commonwealth relied upon in this case." *Id.* Although in Thomas's case there were three serious aggravating factors presented to the jury, rather than one, Thomas's jury heard no mitigating evidence at all, and thus was left with little choice but to find the aggravating factors controlling and to impose a sentence of death. Thus, there is a reasonable probability that at least one juror would have decided that Thomas's mental condition constituted sufficient mitigation to render the death penalty improper.

As the Supreme Court recently explained in *Penry v. Lynaugh*, "'evidence about the defendant's

background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). The extensive evidence available suggesting that Thomas was suffering from paranoid schizophrenia and other mental conditions, along with evidence of his suicide attempt and the background information that Thomas's family members could have provided, "might well have influenced the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 398.[16] As another court in this circuit recently explained, "[i]n case after case, federal courts have found prejudice when counsel fails to

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[16]The Commonwealth suggests that this additional evidence might actually have hurt Thomas's case, as it would have opened the door to further jury consideration of Thomas's past criminal acts. This argument is unpersuasive, however, as the jury was already well aware of at least two of Thomas's past convictions–for the sexual assault of a three-year-old boy, and for criminal trespass, in which he entered the home and climbed into the bed of a sleeping woman. Given that the jury had already found that the prosecution had sufficiently proven the existence of past felonious behavior as an aggravating factor, it seems improbable that additional information concerning Thomas's past convictions and serious mental instability would have further harmed Thomas's case.

investigate, develop, or introduce mitigating evidence that is similar to the evidence in [defendant's] case. This case is no different." *Pursell v. Horn*, 187 F.Supp.2d 260, 387 (W.D. Pa. 2002) (citing *Williams*, 529 U.S. at 397-98; *Jermyn*, 266 F.3d at 257). As in *Pursell* and many other cases, while the potentially mitigating evidence at issue might not have swayed every juror, or even a majority of jurors, Thomas must only show a reasonable probability that one juror would have found death an inappropriate punishment. 187 F.Supp.2d at 386; *see also Jermyn*, 266 F.3d at 309. Thomas has successfully met this burden, and so counsel's failure to present–or even investigate–this evidence meets the Strickland standard of prejudice.

C.

Because counsel failed to present any evidence in mitigation, Thomas's chance to escape the death penalty became especially contingent upon counsel's penalty phase closing argument. Sadly, that performance was grossly deficient: counsel's closing argument was largely incoherent, and portions of it that could be said to have a semblance of coherence served only to underscore the tragic fact of Johnson's death:

> Now, whatever the Commonwealth has tried to structure for you, and I am not being facetious when I say it, I

> point out that Miss Johnson is dead. The Commonwealth would have you look for a practical point that this was done, that was done, albeit it was done.
>
> Now, the question is Miss Johnson is dead.... I only ask that you insofar as as [sic] determining your verdict take your time as to what your verdict may be.... I don't know if I am using the correct word when I say verdict, sentence, your verdict has been entered.

N.T.2/6/86 at 6.53-54.

Other portions of the sentencing closing invited the jury to consider factors irrelevant to their sentencing deliberations, and reflected serious misunderstanding of the nature of the legal principles and proceedings in play. For example, defense counsel argued that there was insufficient evidence to convict Thomas of rape even though the jury had, by that point in the proceedings, already rendered a guilty verdict on the rape charge. *Id.* at 6.52. Similarly, in attempting to rebut the prosecution's prior violent criminal history aggravator, counsel not only made an implausible, speculative argument about the possible existence of a "different" Brian Thomas, but he also led the jury away from its proper consideration of whether Thomas had a significant history of *violent* felony

convictions to consider instead whether he had a "significant history of felony convictions," without any regard for their violent or non-violent nature. *Id.* at 6.54-55.

As lamentable as these discrete errors or misstatements may be, they pale in comparison to the impression left by a reading of the closing argument in toto:

> With the Court's permission, ladies and gentlemen of the jury, having arrived at a verdict, you are now on the penalty stage in which you are the determiners of that.
>
> One thing, during the case in chief I might want to point out notwithstanding your returning verdict as you have, I still would like to point out the factor that maybe there may not be there which seems to come about by virtue of you asking a particular question. That is the particular situation concerning the rape charge. Now, be that as it may, we thought in terms it wouldn't be necessary to explain to you what is meant by sexual intercourse, but, of course, if you find your conclusion were predicated upon remote sperm, that's one thing.

That was however, if you are dealing with the situation I don't recall any particular testimony, expertwise or medical testimony or anything else, that may give rise to someone having sexual intercourse or for that matter involuntary sexual deviate conduct or act.

Your verdict is there, but I still point that phase out to you that there was no indication of the usual sexual intercourse definition in which it would be necessary to find that there was an insertion of a penis. That came to whatever came to.

In dealing–what you are dealing with you have a situation where you have to determine whether or not it would be the imposition of the death penalty or life in this matter.

Now, whatever the Commonwealth has tried to structure for you, and I am not being facetious when I say it, I point out that Miss Johnson is dead. The Commonwealth would have you look for a practical point that this was done, that was done, albeit it was done.

Now, the question is Miss Johnson is dead. You will be instructed by the Court on the limitations insofar as the imposition of the death penalty, when it can occur, under what circumstances, and how are you to evaluate that.

Now, with regard to the particular matter that you have heard, I point out that how do you approach this phase of it, I will underscore and ask you to do the same as I asked you to do in the case in chief or the case itself. Again with regard to this, you have to evaluate it, you have to determine what your position is and determine what your verdict will be.

I only ask that you insofar as as [sic] determining your verdict take your time as to what your verdict may be, also having arrived at your decision in good conscience, whatever it may be, to stand by that verdict. I don't know if I am using the correct word when I say verdict, sentence, your verdict has been entered.

With regard to the matters of prior record of Mr. Thomas, I submit to you, ladies and gentlemen, you have

a 1977 or 1978 guilty plea situation with regard to Mr. Thomas.

As to the 1984 situation, you have a Brian Thomas. It has not been demonstrated to you that he is the one.

Aside from that, you will find that the Court will instruct you that it will be necessary that you find a significant history of felony convictions. I will leave it to the Court to explain what is meant by significant history, take them one at a time, felony convictions, plural. So there is a standard, there is a test that you must evaluate and you must apply, but under the circumstances that you have had in listening to this case, I harken to you that it is a situation in which a death has occurred. It's a situation that you have spoken of.

On behalf of Brian Thomas I would ask that you consider very strongly in your sentence to consider the imposition of the death penalty. Thank you, ladies and gentlemen–the non-imposition of the death penalty, and bring back a verdict or a sentence of life imprisonment.

N.T.2/6/86 at 6.51-55.

In sum, counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment. Counsel wholly failed in his duty to present a closing argument helpful to Thomas. Instead, counsel's closing, whose importance was heightened in the absence of any mitigating evidence, gravely prejudiced his client.

D.

The Commonwealth argues that any assertable deficiency of defense counsel in investigating possible lines of a mitigation defense at the sentencing phase cannot constitute a cognizable instance of ineffective assistance of counsel for the reason that Thomas directed counsel not to argue in mitigation. Thomas does not deny that he so advised counsel, and the record reflects that Thomas, in colloquy, even expressed such a desire to the trial judge. But while "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," *Strickland*, 466 U.S. at 691, not every such waiver is constitutionally valid.

As the Supreme Court made plain more than sixty years ago, "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known

right or privilege. The determination of whether there has been an intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The Court has examined this requirement in several contexts, most notably with respect to a defendant's guilty plea. *See, e.g., North Carolina v. Alford*, 400 U.S. 25, 31 (1970) ("The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."); *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (waiver in the context of a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."). In its discussion of the waiver of the right to counsel, the Court has used similar language in terms of the knowledge required.

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); *see also* Pa. R. Crim. P. 121(c) (requiring a "knowing, voluntary, and intelligent waiver of counsel"). As the Court recently explained, "The purpose of the 'knowing and voluntary' inquiry ... is to determine whether the defendant actually [understands] the significance and consequences of a particular decision[.]" *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993).

Courts have extended this standard to waivers of the right to present mitigating evidence, *see, e.g., Wilkins v. Bowersox*, 145 F.3d 1006, 1015-1016 (8th Cir. 1998), and it is clear that such a waiver cannot be knowingly and intelligently made in the absence of full information about the nature of one's choices. "First, counsel's duty to investigate reasonably and inform and advise his client must be fulfilled before either the lawyer or his client can decide what evidence to present; *if counsel failed to investigate and advise, then Petitioner's waiver was not knowing and intelligent and thus without legal effect.*" *Holloway*, 161 F.Supp.2d at 569 (emphasis added), *rev'd on other grounds*, 355 F.3d 707 (3d Cir. 2004). As the Third Circuit has squarely held, the absence of an informed decision vitiates an otherwise valid waiver. *See United States v. Gray*, 878 F.2d at 712. The court in *Gray* expressly held that a defendant's reluctance to subpoena witnesses could not act as a waiver of his right to have those witnesses testify, as this reluctance was based on inaccurate information–counsel

did not know, and therefore failed to inform the defendant, that subpoenaed witnesses were entitled to compensation for their expenses. *Id.* "This therefore is not a case in which the defendant made an informed decision which precluded counsel from having a duty to pursue a given line of investigation." *Id.*

Indeed, as several courts have suggested, the failure to investigate itself precludes a knowing waiver, as there will always be uninformed decisions in such cases. *See, e.g., Blanco v. Singletary*, 943 F.2d 1477, 1500-03 (11th Cir. 1991) (counsel's failure to talk to potential mitigation witnesses and to investigate defendant's mental health status resulted in an unknowing, involuntary waiver, as without knowing what evidence defendant was foregoing, counsel "could not have advised [him] fully as to the consequences of his choice not to put on any mitigation evidence"). A defendant's desire not to present mitigating evidence, therefore, cannot by itself terminate counsel's duty to investigate. Indeed, "[t]he reason lawyers may not 'blindly follow' such commands is that although the decision whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering potential merit." *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986). *See also Battenfield v. Gibson*, 236 F.3d 1215, 1227-35 (10th Cir. 2001) (because counsel failed to conduct a reasonable investigation for possible mitigating evidence, he

could not competently advise the defendant as to the meaning, nature, and availability of such evidence; therefore, the defendant's waiver was not knowing and intelligent); *Coleman v. Mitchell*, 268 F.3d 417, 449-50 (6th Cir. 2001) (for the refusal to present mitigating mental health evidence to be an informed one, counsel must fulfill its independent obligation to investigate despite a defendant's expressed wishes to the contrary); *Matthews v. Evatt*, 105 F.3d 907, 920 (4th Cir. 1997) ("counsel has the obligation to conduct a reasonable investigation even if the defendant is reluctant to cooperate"); *Weekley v. Jones*, 76 F.3d 1459, 1466 (8th Cir. 1996) ("an attorney may [not] blindly follow a client's uncounselled wishes").

In the instant case, the evidence is compelling that Thomas's decision not to present mitigating evidence was not an informed one. His counsel never made clear to him the gravity of his decision not to present mitigating evidence, and it is apparent that Thomas did not understand the nature of the penalty phase hearing. As Thomas stated in his affidavit prepared in support of his petition, he "did not then understand that I could present evidence concerning my character as a mitigating circumstance during the penalty phase. I was under the belief that I could only present evidence relating to the circumstances of the offense." Affidavit of Brian Thomas, Exhibit F. Although the trial court, in colloquy, attempted to make clear the consequences of Thomas's decision not to present

mitigating evidence, the transcript does not indicate that Thomas truly understood the type of information he could present and the way in which such evidence could factor into sentencing. In particular, it was not made clear to Thomas, either by the trial court or by counsel, how this stage of the trial materially differed from the guilt phase:

> [Defense Counsel]: Mr. Thomas, you recall during the case in chief we inquired as to whether or not you wanted to testify in your own behalf. Do you recall that?
>
> THE DEFENDANT: Yeah, I do. Why do I answer all these questions before? We done be over that already. No, I don't want to get on the stand.
>
> THE COURT: Well, this is a different portion.
>
> THE DEFENDANT: I still don't want to get on the stand.
>
> THE COURT: Under no condition?
>
> THE DEFENDANT: No.
>
> THE COURT: This is your own decision?
>
> THE DEFENDANT: Yes it is.

THE COURT: Did you discuss it with your lawyer, Mr. Watson?

THE DEFENDANT: Yes.

THE COURT: And you already told him, I would like to repeat, but it's your decision not to take the stand at this penalty stage of the hearing or even to present any evidence. Is that your independent and voluntary decision?

THE DEFENDANT: It is.

THE COURT: Any promises or threats been made to you to induce you to take that position?

THE DEFENDANT: No.

THE COURT: Now, let me point out to you that this is an extremely serious matter to you. The jury may return a verdict of death in the electric chair if they find certain matters have occurred. On the other hand, they may come back in with a verdict of life imprisonment. Now, having told you this, the importance of this decision of yours should be very clear to you. Is it?

THE DEFENDANT: Yeah, it is.

THE COURT: Where are you right now, this very moment?

THE DEFENDANT: In City Hall.

THE COURT: Do you know the courtroom?

THE DEFENDANT: 654.

THE COURT: Have you taken any drugs or anything within the last 24 hours?

THE DEFENDANT: No.

THE COURT: Are you satisfied with the representation of you by Mr. Watson so far?

THE DEFENDANT: I am.

[The prosecutor]: May I ask two questions?

THE COURT: Yes.

Q.: Mr. Thomas, do you have any witnesses that you would like to call at this time at this stage at this proceeding?

A.: No.

Q.: Are you sure about that?

A.: No.

[Defense counsel]: No, no, I only asked him one time. Why keep asking the same question?

THE COURT: You mean no, you don't have any witnesses to call?

THE DEFENDANT: Right.

[The prosecutor]: Q. There is no witness in existence you would like to call, sir, at this time. Yes or no?

A.: I said no.

[The prosecutor]: Thank you. I am satisfied, Your Honor.

THE COURT: All right, bring the jury back.

Because the nature of the proceeding was not adequately explained to Thomas, he could not possibly have had full knowledge of what he was waiving when he instructed counsel that he did not wish to present mitigating evidence. As such, his waiver was not made knowingly, voluntarily, and intelligently, and therefore must be considered invalid. Counsel had a duty to investigate that was independent of any expressed reluctance of Thomas. Only after such an investigation would counsel have been in a position to advise Thomas of all the avenues available to him, explain to him the nature

of the proceeding, and then be guided by his client's informed decision. The duty to investigate is well established, and it cannot be overcome by the misguided instructions of an uninformed client.

Thomas's asserted waiver of the right to present mitigating evidence was uninformed and hence ineffective. Therefore, it could not cure the *Strickland* deficiency canvassed above. In sum, Thomas was denied his Sixth Amendment right to effective counsel at the penalty phase of his trial, and is therefore entitled to a new sentencing hearing.

Claim III–Denial of effective assistance of counsel

Invoking *United States v. Cronic*, 466 U.S. 648 (1984), Thomas argues that defense counsel's assistance at the penalty phase was *per se* ineffective given counsel's failure to adduce any mitigating evidence, to agree to a stipulation that would have allowed the jury to consider Thomas's age and high school diploma as mitigating factors, and to render a coherent closing argument.

In contrast with *Strickland*, which requires a showing of prejudice, *see* 466 U.S. at 694, in *Cronic*, the Supreme Court has identified three situations implicating the right to counsel that involved circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case

is unjustified." *Cronic*, 466 U.S. at 658-659. Relevant here is the situation where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *id.* at 659, which results in a "denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable," *id.* Thomas argues that counsel's failure to mount any defense during the penalty phase effectively deprived him of counsel altogether, thereby presumptively establishing prejudice.

There is certainly much to lament in defense counsel's penalty phase performance. Nonetheless, the court need not reach the issue of whether counsel was ineffective *per se* in light of the court's finding, under Claims I and II, that counsel's performance met the *Strickland* standard for ineffectiveness. Thus, Thomas would not benefit from further relief even if the court were to find in his favor on Claim III. Accordingly, this claim will be dismissed without prejudice.[17]

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[17]The court notes, however, that counsel did deliver a closing argument (however inadequate it was), seek to cross-examine the prosecution's penalty-phase witnesses, and move to have the court impose, as a matter of law, a sentence of life imprisonment on the basis of various alleged improprieties (e.g., that the jury should have been life qualified in addition to death qualified; that the prosecution should not have invoked the victim's pain and suffering in its closing at the guilt phase). Thus, counsel's failures were likely not sufficiently global to place Thomas's case within the *Cronic*

(continued...)

Claim IV–Trial court's failure to order a competency evaluation at sentencing

Thomas contends he was denied due process by the trial court's failure to *sua sponte* order a hearing regarding his competency to waive his right to present mitigating evidence, after it had received a copy of the presentence report indicating Thomas's questionable mental health. In addition, Thomas contends trial counsel was deficient for failing to request such a hearing or otherwise raise the matter at sentencing.

While it is true that "due process requires that the trial court inquire *sua sponte* into the defendant's competence if there is reason to doubt it," *United States v. DiGilio*, 538 F.2d 972, 987 (3d Cir. 1976), Thomas's argument that the presentence report provided such reason for doubt is belied by the report itself. Lawrence Byrne, the psychologist who conducted a court-ordered evaluation as part of the presentence report, found Thomas to be competent. Assuming, *arguendo*, that Thomas was entitled to a court-ordered investigation into his competency, this entitlement was satisfied by Byrne's evaluation. As the Commonwealth persuasively notes, "[s]urely the court was

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[17](...continued)
presumption, which applies only to those instances when the "attorney's failure [was] complete," *Bell v. Cone*, 535 U.S. 685, 697 (2002).

not supposed to keep sending [Thomas] back until the psychologist concluded otherwise." Response to Petition, at 62.

Since Thomas did not have a right to another competency evaluation, counsel cannot have been deficient for failing to raise the issue at trial.[18]

Claim V–Defense not provided a copy of the presentence report

Noting that the trial court record does not indicate whether or not trial counsel ever received a copy of the presentence investigation (PSI) report, Thomas speculates that his counsel may not have received the report. That report contained Lawrence Byrne's court-ordered psychological evaluation of Thomas, and stated that Thomas suffered from "Severe Multiple Personality Disorders," as well as "Sociopathic, Reactive Paranoid, and Schizoid Traits." Pet. Ex. K. at 4. Further, Byrne found that Thomas exhibited "a great deal of

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[18]Thomas raises an ineffectiveness of counsel argument as a corollary to nearly all of the substantive claims in his petition. Because none of the claims he raises, with the exception of Claims I and II, are valid claims of error, the ineffective assistance claims that hereinafter appear as part of his substantive claims are similarly denied. In each instance where there is no substantive right or violation at issue, counsel cannot be found deficient for failing to advance a meritless argument.

underlying psychopathology which is clearly focused in the sexual area, with indication of ... very primitive, brittle and inadequate controls." *Id.* Thomas argues that the PSI report would have been invaluable to his counsel since it called into question his ability to waive mitigating evidence and, indeed, to be prosecuted at all. Because due process forbids a court from imposing the death sentence, "at least in part, on the basis of information which he had no opportunity to deny or explain," *Gardner v. Florida*, 430 U.S. 349, 362 (1977), Thomas contends that his due process rights were violated if his counsel was not given the PSI report. *See also Commonwealth v. Martin*, 351 A.2d 650, 657 (Pa. 1976) ("if the court orders a presentence report, defense counsel has a right to examine its contents before sentencing and, if he contests any portion, to offer evidence in rebuttal.").

Of course, as Thomas acknowledges, the claim of a due process violation is speculative, and will remain so until it is known whether defense counsel received the PSI report. Thomas thus requests an evidentiary hearing on this issue. The Commonwealth contends that 28 U.S.C. § 2254 (e)(2) forbids such a hearing. That section provides that "[i]f the [habeas] applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–(A) the claim relies on–(i) a new rule of

constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

The Supreme Court has stated, however, that the conditions imposed by § 2254(e)(2) apply *only* to the habeas petitioner who is "at fault for the deficiency in the state-court record." *Williams v. Taylor*, 529 U.S. 420, 433 (2000). By contrast, said the Court in *Williams*, "[i]f there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." *Id.* at 437.

The *Williams* habeas petitioner was found by the Court not to have exercised the diligence required to preserve the claim that nondisclosure of a psychiatric report evaluating Williams's co-defendant was in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963). While the report had been prepared before Williams's trial, and was found in his file when it was reviewed by counsel for his federal

habeas petition, the issue was first raised in Williams's federal habeas petition, and Williams's state habeas counsel later averred that he did not recall seeing the report at the time that he reviewed Williams's file to prepare for Williams's state habeas case. The Court rejected this explanation, noting that "[t]here [were] repeated references to a 'psychiatric' or 'mental health' report in a transcript of [the co-defendant's] sentencing proceeding, a copy of which petitioner's own state habeas counsel attached to the state habeas petition he filed with the Virginia Supreme Court." 529 U.S. at 438.

Counsel for Thomas's direct appeal and initial PCRA filings were in much the same position as Williams's state habeas counsel. The transcript of Thomas's sentencing proceeding shows that the court ordered a "pre-sentence evaluation and also a psychiatric [evaluation]" in anticipation of the post-trial motions. N.T. 2/7/86 at 11. Further, it is routine for Pennsylvania trial judges hearing death penalty cases to order a pre-sentence report. *See, e.g., Commonwealth v. Fears*, 836 A.2d 52 (Pa. 2003); *Commonwealth v. Markley*, 501 A.2d 1137, 1143 (Pa. Super. Ct. 1985); *Commonwealth v. Shoemaker*, 313 A.2d 342 (Pa. Super. Ct. 1973). It is thus difficult to suppose that Thomas's direct appeal or initial PCRA counsel would not have known about the existence of the pre-sentence report. And, once apprised of the report's contents, these later counsel should have sought to determine why trial counsel neglected to rebut it.

Like the petitioner in *Williams*, then, Thomas cannot be said to have exercised the diligence that would entitle him to by-pass the strictures of § 2254(e)(2). Nor can Thomas establish grounds for the non-applicability of these strictures. As noted above, when a habeas petitioner has failed to develop the factual basis of a claim in state court, a federal court may grant an evidentiary hearing only if "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2254 (e)(2)(B). Here, then, Thomas would have to demonstrate by clear and convincing evidence that the judge would have rejected the jury's imposition of death if trial counsel had received the report. This, in turn, requires that Thomas demonstrate by clear and convincing evidence that trial counsel could have successfully rebutted Byrne's competency evaluation. Thomas does not attempt to make such a showing, and the record does not indicate that such a showing could be made. Accordingly, Thomas's request for an evidentiary hearing on this issue must be denied.

* * * * *

V.

Earlier this month, at the annual meeting of the American Bar Association, Justice Stevens

conferred on his friend Abner Mikva–former Counsel to President Clinton, and former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit–the Association's Thurgood Marshall Award. Being called on to make the presentation was, Justice Stevens said, "especially gratifying because" it gave him "an opportunity to reminisce about friendships that" the Justice and his wife "especially cherish." In talking about his late colleague, Justice Marshall, Justice Stevens of course spoke of Marshall's triumphant appellate advocacy in *Brown v. Board of Education*, but he also observed that Marshall's "years of dedicated advocacy in countless trial court proceedings in hostile surroundings provide even stronger evidence of his heroic contribution to the cause of civil rights and equal justice." Justice Stevens then noted Marshall's opposition to capital punishment, and the Justice went on to point out some of the procedural aspects of the process that give particular cause for concern. One aspect to which Justice Stevens referred is that, "as many have pointed out and as our cases reveal ... a significant number of defendants in capital cases have not been provided with fully competent legal representation at trial."

Sadly, the case at bar exemplifies this problem. Brian Thomas was adequately represented at the guilt phase of his trial, and so his conviction will not be disturbed. But Thomas was not adequately represented at the penalty phase of his trial. For this reason, the death sentence imposed

on Thomas will be vacated. If the Commonwealth elects to seek the death penalty again, there will be a new sentencing hearing at which Thomas will receive competent representation. In the alternative, the Commonwealth may elect to acquiesce in the imposition of a sentence of life imprisonment without parole.

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

BRIAN THOMAS, Petitioner, v. JEFFREY BEARD, et al., Respondents.	CIVIL ACTION No. 00-803

August 19, 2005

ORDER

For the reasons set forth in the accompanying opinion, it is hereby ORDERED that Brian Thomas's petition for habeas corpus is DENIED in part and GRANTED in part:

1. The portion of the petition that alleges that Mr. Thomas's conviction was constitutionally flawed, and should be set aside, is DENIED.

2. The portion of the petition that alleges that Mr. Thomas's sentence of death was

constitutionally flawed, and should be set aside, is GRANTED. The sentence of death is vacated. The Commonwealth, if it elects again to seek a death sentence, may, within six months from the date of this order, initiate a new sentencing proceeding for Mr. Thomas. Or, if the Commonwealth so elects, the Commonwealth may assent to the imposition of a life sentence without parole.

/s/_____
Pollak, J.

[EXCERPT]

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH : AUGUST TERM, 1985

vs. :

BRIAN THOMAS : NO. 2716

OPINION AND ORDER

PAPALINI, J.

Steven A. Morley, Esquire, has filed an Amended Petition for relief on behalf of the Defendant pursuant to the Post conviction Relief Act, 42 Pa.C.S.A. §9541 *et seq.*

* * * * *

G. SENTENCING INEFFECTIVENESS AND VIOLATION OF CONSTITUTIONAL RIGHTS

Petitioner asserts that trial counsel was ineffective because: (1) He permitted an incomplete waiver to suffice as the basis for deciding not to

produce any evidence at all at the sentencing hearing; (2) He failed to adequately explain to his client the nature and purpose of evidence at the sentencing hearing, so that Petitioner would be able to knowingly, intelligently and voluntarily waive his right to present any evidence at the sentencing hearing; (3) He failed to secure a psychological report of Petitioner which would have demonstrated mitigating facts; (4) He failed to develop a theory and evidence so the jury could have some facts regarding Petitioner (affidavits supplied); (5) He failed to produce any mitigating evidence even though it was available at the time; he failed to adequately explain the need for such evidence to Petitioner and the consequences of failing to produce it (affidavits supplied).

Petitioner also asserts that his state and federal constitutional rights were violated when Petitioner waived his right to present any evidence at the sentencing hearing in a colloquy that did not adequately inform him of the nature and purpose of the hearing and the evidence.

We find that the issue of the advice given by counsel regarding Petitioner's right to introduce mitigating circumstances; the sufficiency of the on-the-record colloquy; and violations of his constitutional rights with respect to the waiver were previously decided by the Supreme Court on direct appeal. They were therefore, previously litigated, and are not subject to additional PCRA review by

this court. (See 561 A.2d at 710). See *Commonwealth v. Buehl*, __ Pa. __, 658 A.2d 771 (1995).

Furthermore, the jury found three aggravating circumstances: (1) the killing was committed while in the perpetration of a felony [42 Pa.C.S.A. §9711(d)(6)]; (2) Petitioner had a significant history of felony convictions involving the use or threat of violence to the person [42 Pa.C.S.A. §9711(d)(9)]; and (3) the death was committed by means of torture [42 Pa.C.S.A. §9711(d)(8)].

No mitigating circumstances were found, even though the trial court instructed the jury that they could consider all of the statutory circumstances set forth in 42 Pa.C.S.A. §9711(e), as well as any other mitigating circumstances.

The affidavits submitted to this court at best support a possible finding of only one mitigating circumstance: that Petitioner had some good character traits, so that his life has merit and that his execution would be devastating to his family.

His relatives assert that he enjoyed a close and loving relationship with them and their children, was helpful to them and gave them good advice about staying away from drugs; that he would help elderly neighbors do chores, including shopping and carrying groceries, and was respectful to them; that he completed training as a hair dresser at Wilfred Academy and that he was

thereafter employed in that capacity, and cut hair for his relatives at no charge; and that he always repaid money that he borrowed from them.[6]

We conclude that even if Petitioner had not waived his right to introduce evidence of mitigating circumstances, the above evidence, even if entirely believed by the jury, would not, as a matter of law, have been sufficient to overcome the three aggravating circumstances found by the jury.

Therefore, even if counsel should have introduced the evidence, Petitioner suffered no prejudice, because the evidence could not possibly have made a difference in the outcome of the penalty phase of the trial: Petitioner would still have been sentenced to death.

APPELLATE COUNSEL'S INEFFECTIVENESS

Petitioner claims that appellate counsel failed to raise on appeal Issues 4, 5, 10, 11, 16, 21, 25, 26 (as set forth on pages 4 to 8 *supra*).

We have determined that those issues are without merit. Therefore, appellate counsel was not ineffective for failing to raise them on appeal.

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[6]His mother, brother and two sisters have submitted affidavits.

For the reasons set forth above, post-conviction relief will be denied.

ORDER

AND NOW, this 13th day of September, 1995, after a review of the pleadings, record, evidence and argument of counsel, it is hereby ORDERED and DECREED that post-conviction relief is DENIED.

BY THE COURT:

/s/ Joseph I. Papalini
J.

AFFIDAVIT/DECLARATION OF DR. PATRICIA FLEMING PURSUANT TO 28 U.S.C. § 1746 AND 18 Pa.C.S. § 4904

1. My name is Patricia Fleming. I am a licensed clinical psychologist.

2. I have performed numerous psychological and neuropsychological evaluations, and have held contracts and consultation positions for corrections, social service and school agencies, and other state and federal agencies. I have performed psychological and neuropsychological evaluations in civil and criminal proceedings in state and federal courts for both the prosecution and defense, and have been appointed as a court expert. I am a member of several organizations, including the American Psychological Association, the National Academy of Neuropsychologists, and the National Association of Disability Examiners.

3. I have examined numerous materials about the *Commonwealth v. Brian Thomas* case. I reviewed court and school records, transcripts, affidavits, reports and other documents relating to Mr. Thomas, his background, his capital trial and his capital sentencing hearing. I also conducted a preliminary evaluation of Mr. Thomas, interviewed him, and administered a psychological and neuropsychological test battery to him. All the opinions stated herein are stated to a reasonable degree of psychological and neuropsychological certainty.

4. Based upon my preliminary interview with Mr. Thomas, it is clear that he suffers from a major mental illness. As a central feature of this major mental illness, Mr. Thomas exhibits schizoid features compounded by significant manifestations of paranoia. His affect is blunted and flat. His thinking and conversation shows a poverty of content, is tangential, and often illogical. His conversation is marked by thoughts and fears that have been present for a number of years. The presence of these diagnostic criteria would have been sufficient to diagnose Mr. Thomas as paranoid schizophrenic at the time of trial under the diagnostic criteria enumerated in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 3d Edition ("DSM-III"). The DSM is the official psychiatric diagnostic manual of the American psychiatric community, and is relied upon by mental health professionals in rendering diagnoses. The DSM-III was the edition in effect at the time of Mr. Thomas' trial.

5. The psychological symptoms exhibited by Mr. Thomas during my interview with him are consistent with the symptoms that would have been exhibited in 1977, when he was diagnosed at the Cornwall Heights Youth Center as suffering from paranoid schizophrenia. Schizophrenia is one of the most severe of the major mental illnesses. People who suffer from schizophrenia are seriously and substantially impaired in their functioning; have problems with cognition; have difficulties in

thinking clearly, logically and rationally; and suffer from delusions and/or hallucinations.

6. The psychological symptoms exhibited by Mr. Thomas during my interview with him are consistent with the psychological symptoms that would have been exhibited at the time of the preparation of the presentence report in this case, as evidenced by Dr. Byrne's reference to Mr. Thomas' schizoid traits. In addition to those psychological symptoms, Dr. Byrne concluded that Mr. Thomas suffered from severe multiple personality disorder. It is particularly significant that Mr. Thomas was diagnosed by the State's own doctor as suffering from a major mental illness at the time of trial.

7. The continuing presence of these symptoms over time strongly reinforces my conclusion that Mr. Thomas has been suffering from a major mental illness for many years. There is no doubt that he was suffering from this major mental illness at the time of the offense in question through the time of trial.

8. In 1975, Mr. Thomas was committed to the Hall-Mercer Children's Service of Pennsylvania Hospital. In 1977, Mr. Thomas was diagnosed as paranoid schizophrenic. Given the nature of the offense at issue, evidence of either a prior psychiatric commitment or a diagnosis of paranoid schizophrenia would have mandated a thorough investigation into Mr. Thomas' mental history and

status. In light of both his commitment and this diagnosis, the failure to conduct a mental health investigation and to present mental health mitigating evidence was inexcusable.

9. A competent mental health professional would have been able to testify to these facts and to render these opinions at the sentencing stage of Mr. Thomas' capital trial and/or in an evidentiary hearing conducted pursuant to Mr. Thomas' post-conviction petition.

10. I hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief pursuant to 28 U.S.C. § 1746 and 18 Pa.C.S. § 4904.

/s/_____
Dr. Patricia Fleming

AFFIDAVIT OF BRIAN THOMAS

Brian Thomas, being duly sworn according to law, deposes and says:

I am the appellant in the within action. I was convicted of murder in the first degree and sentenced to death. I was asked by the trial judge and the Assistant District Attorney whether I wanted to present evidence at my sentencing hearing. I said I did not want to present anything after consulting with my attorney, Lawrence Watson, II, Esquire. However, I did not then understand that I could present evidence concerning my character as a mitigating circumstance during the penalty phase. I was under the belief that I could only present evidence relating to the circumstances of the offense. This is the reason why I declined to present any testimony at the penalty hearing.

I was aware that members of my family were willing to testify on my behalf at the penalty hearing. Had I understood that their testimony was permissible, I would have asked my attorney to call them.

At no time did my attorney explain to me that evidence concerning my character could or should be presented for the jury's consideration at the penalty hearing.

/s/
BRIAN THOMAS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 12th DAY
OF AUGUST, 1988

/s/ Jerry Lynn Everhart
NOTARY PUBLIC

JERRY LYNN EVERHART, Notary Public
Huntingdon, Huntingdon County, Pa.
My Commission Expires August 20, 1990

AFFIDAVIT OF SARA THOMAS

Sara Thomas, being duly sworn according to law, deposes and says:

I am the natural mother of Brian Thomas. During the course of my son's trial on the instant charges, I was available and willing to testify on behalf of my son at the penalty phase of the case. If called, I would have testified that I have enjoyed a close relationship with my son, who was 26 years of age at the time of the trial; that he has been a good son to me; and that he has enjoyed a close relationship with his three sisters, his brother, and other members of the family.

As a teenager, Brian Thomas lived with me at a Philadelphia housing project. Brian was helpful to elder residents who were frequently unable to climb stairs to their apartments. On numerous occasions, Brian would help elderly citizens with their shopping, and with respect to one particular resident, he often carried groceries to her apartment on the eleventh floor. Brian was well liked because of acts of kindness such as these.

Brian graduated from high school, and subsequently enrolled for classes at the Wilfred Academy in hairdressing. He received a certificate after completing this program, and immediately found a job cutting and setting hair at Andre Ross, a salon in Center City, Philadelphia. He later cut and set

hair in his house, and also maintained other part-time employment up until the date of his arrest on this case.

Although I did not then understand the importance of presenting evidence on behalf of my son at the penalty hearing, I would have taken the stand, if called, and I would have said then what I am saying today. Despite his conviction and sentence, I believe my son's life has merit; and if he is executed, the loss of his life will have a devastating effect on the entire family.

/s/
SARA THOMAS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 3rd DAY
OF August, 1988.

/s/ Jeanne M. Grace
NOTARY PUBLIC

JEANNE M. GRACE
Notary Public, Phila., Phila. Co.
My Commission Expires Feb. 10, 1992

AFFIDAVIT OF CYNTHIA THOMAS

Cynthia Thomas, being duly sworn according to law, deposes and says:

Brian Thomas is my younger brother. I attended his trial, and was available and willing to testify on his behalf at the penalty phase of the case. If called, I would have testified that I have enjoyed a close relationship with my brother. Brian also enjoys a close relationship with his mother, sisters, nieces, and nephews.

Brian has always been thoughtful and kind to me and to my sisters. He has never been violent toward me or toward my son. On the contrary, he has been willing to help people who are ill or unable to get out to do basic errands, such as food shopping. When we grew up in a South Philadelphia project, Brian was helpful to and respectful of the elderly residents. They trusted him to do their shopping or to help them with chores inside their apartments. He was always very active, and preferred to do things for others rather than sit around and do nothing.

About six years ago, Brian needed a place to stay temporarily, and I permitted him to live with me and with my son, Torey. Shortly after he moved in, he enrolled for full-time classes at Wilfred Academy. He worked extremely hard, and eventually earned a certificate in hairdressing. He

later held several jobs in hairdressing, including a job at a Center City salon.

During the period of time that Brian was living with me, he was extremely helpful to me and to my family. He enjoyed a close rapport with my son, and to this day, he and my son write to each other on a regular basis. Brian was always willing to babysit when needed, and it was a pleasure to have him in my house for the period of time he lived with us.

If called, I would have taken the stand to testify on behalf of my brother. Despite his conviction and sentence, I believe his life has merit, and that if he is executed, the loss of his life will have a devastating effect upon members of his family.

/s/
CYNTHIA THOMAS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 3rd DAY
OF August, 1988.

/s/ Jeanne M. Grace
NOTARY PUBLIC

JEANNE M. GRACE
Notary Public, Phila., Phila. Co.
My Commission Expires Feb. 10, 1992

AFFIDAVIT OF LORENZO THOMAS

Lorenzo Thomas, being duly sworn according to law, deposes and says:

I am the only brother of Brian Thomas. During the course of my brother's trial on the instant charges, I was available and willing to testify on his behalf at the penalty phase of the case. I attended most of the trial, and I was present at the time of the penalty hearing. If called, I would have testified that I have enjoyed a close relationship with my older brother, who was 26 years of age at the time of the trial. He has also been extremely close to my children, and they ask about him frequently. Brian also enjoys a close relationship with his mother, sisters, nieces, and nephews. I know that he wanted children of his own very much.

When I was a teenager, Brian's focus was upon school and employment. He graduated from high school and later attended Wilfred Academy, where he earned a certificate in hairdressing. He got a job cutting and setting hair at Andre Ross, a salon in Center City, Philadelphia. He later worked out of his house, and was always willing to cut family members' hair for free. He even taught me how to cut hair, and gave me some of his tools.

Brian was always a hard worker and was extremely supportive of his family. When one of his sisters needed money or a babysitter, Brian

made himself available. He went out of his way to help elderly neighbors at the Philadelphia Housing Authority project where we lived. He would help people with their groceries, and he would check up on elderly neighbors who were unable to get out.

When I was a teenager, I looked up to my brother. He told me not to hang out in the streets and to stay away from drugs. If called, I would have testified on my brother's behalf at the penalty hearing. Despite his conviction and sentence, I continue to believe that my brother's life is important to me and to my entire family.

/s/
LORENZO THOMAS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 3rd DAY
OF August, 1988.

/s/ Jeanne M. Grace
NOTARY PUBLIC

JEANNE M. GRACE
Notary Public, Phila., Phila. Co.
My Commission Expires Feb. 10, 1992

AFFIDAVIT OF VALERIE THOMAS

Valerie Thomas, being duly sworn according to law, deposes and says:

Brian Thomas is my older brother. I attended his trial, and was available and willing to testify on his behalf at the penalty phase of the case. If called, I would have testified that I have enjoyed a close relationship with my brother. He has also been extremely close to my children. Brian also enjoys a close relationship with his mother, sisters, nieces, and nephews.

Brian has always been thoughtful and kind to me and to my sisters. He has never been violent toward me or toward my children. On the contrary, he has been willing to help people who are ill or unable to get out to do basic errands, such as food shopping. When we grew up in a South Philadelphia project, Brian was helpful to and respectful of the elderly residents. They trusted him to do their shopping or to help them with chores inside their apartments. He was always very active, and preferred to do things for others rather than sit around and do nothing.

Brian worked hard at Wilfred Academy, and received a certificate in hairdressing. He was always willing to cut his family members' hair for free, and he had several jobs, including one at a salon in Center City. If he was short on money, he

would borrow from me or other family members, and he was always quick to repay a loan, no matter what amount.

Brian is especially close to my two older children, ages 10 and 8. They ask about him often, and we have visited with him at the prison where he is housed. My children remember the kindness that he showed to them while they were growing up, and they want to visit him more often.

If called, I would have taken the stand to testify on behalf of my brother. Despite his conviction and sentence, I believe his life has merit, and that if he is executed, the loss of his life will have a devastating effect upon members of his family.

/s/
VALERIE THOMAS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 3rd DAY
OF August, 1988.

/s/ Jeanne M. Grace
NOTARY PUBLIC

JEANNE M. GRACE
Notary Public, Phila., Phila. Co.
My Commission Expires Feb. 10, 1992

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[EXCERPT]

PSYCHOLOGICAL EVALUATION

Name: Brian Thomas

* * * * *

Psychologist: P. Sullivan

Dates of Testing: 9/18, 9/19/75

* * * * *

Background Information: Developmental and family historical materials have been detailed elsewhere. Pertinent to this evaluation are the details of the alleged incident for which Brian has been referred. Brian has been charged with Criminal Mischief and Cruelty to Animals on five counts. Apparently on July 14, 1975 Brian abused five police horses by inserting the handle of a broom into their rectums. Two of the horses were seriously injured with one dying very shortly after having been assaulted. Indications were that the dead horse had had the broomstick jammed 3' 10" into its body. Brian has since this time denied abusing more than one horse and insists that he did not mean the horse any harm. Brian had obtained a summer job at the stables and had been employed for approximately one week when the incident occurred. Just prior to the act, Brian had completed cleaning the stables when the horses again began to defecate. He reported that someone suggested he should stick the handle of the broom

which he held in his hand up into the horse's anus to stop him from going. Brian apparently did this without thinking that he could seriously injure the horse(s) in this way. He was discovered while doing this and was taken into custody.

* * * * *

Test Interpretation:

* * * * *

Brian has potential for adequate adjustment and it is necessary to view the act in question against his previous lack of school and legal violations. The alleged act (or acts) was as well committed against an animal rather than a human being. This is not to say that the act was not a manifestation of problems in handling his aggressive and sexual impulses. The incident might best be viewed as an uncharacteristic loss of control and regression to a primitive level. Brian could not have picked a worse job considering his attention to neatness and order. Brian usually becomes somewhat frustrated in situations requiring some deferred gratification (i.e. need to be patient). Thus this setting where one's work is constantly being undone by the defecating horses must have been a source of great frustration. However rather than having the sense to verbally share his feelings or to quit the job, he chose to impulsively act out his pent up rage. This rage is no doubt a transference of an anger more appropriately directed toward his unsatisfactory relationship with both his parents.

A hostile-dependant mother-child relationship is quite evident. Brian's usual way of dealing with his angry feelings was in his words to "keep cool" or more probably to act in passive-aggressive ways such as cutting classes, being subtly oppositional, etc.

Yet it seems that such is done unconsciously and not related to awareness of the original anger. Brian reported in finishing incomplete sentences, 'I'd like to know' "what made me do it," and 'I can't understand' "why I did it." A very shallow emotionality is thereby discerned from the testing as well as in interpersonal interaction with Brian. Rigidity and poor judgment is emphasized in the sense that Brian saw no alternative to what he did except to 'hit the horse'.

Strong sexual impulses are also noted with a phallic preoccupation. A clear sexual identification is not clear. In fact Brian's 'raping' the five horses may represent an over-compensation for homosexual feelings.

Summary and Recommendations:

Brian's inadequate and constricted emotional development contribute to his functioning intellectually at a level lower than that indicated by his potential. His insensitivity to his environment and lack of awareness of inner feelings make it difficult for him to understand and control his aggressive

and sexual impulses. He has however in the past managed to do so but at the price of much frustration and pent up rage. Previous manifestations of such feelings had emerged in a passive-aggressive mode. The situation involved with the killing of the horse by its very nature attacked the defenses which he had erected for dealing with those impulses. His neatness and orderliness served to keep his world in order. With the horses constantly and uncontrollably 'messing' he could no longer control himself. Brian does have potential for an adequate adjustment however psychiatric attention should be given to his problems with aggression and sexual feelings. Brian himself has suggested probation where he would need to check in with someone at least once per week. In addition to this, it is strongly suggested that psychiatric treatment be mandated for the Thomas family for a minimal six month period. Individual therapy would be difficult if not impossible at this time.

/s/
Patricia Sullivan
Psychologist
Child and Family Mental
Health Service

PS/ll

App. 143

[EXCERPT]

PSYCHIATRIC EVALUATION

Brian Thomas - age 16

* * * * *

Date: September 23, 1975
Staff: Dwight R. Ashbey, M.D.

* * * * *

Developmental History

Although Mr. & Mrs. Thomas were still living together, Brian was an unplanned child. Mrs. Thomas said that her marriage was so so at the time. Her pregnancy and the delivery were normal and Brian was a full term baby who ate and slept well and had no medical problems except wheezing with colds. Although he was toilet trained easily he continued to wet the bed at night until he was thirteen.

Mrs. Thomas feels that he is the most immature and dependent of her children. He needs to grow up and to stand up for himself. He is the most helpful and considerate child and has always taken good care of the family pets which now include a dog and a hampster [sic]. She says he gives up easily and holds in his anger and

frustration. When he heard the horse had died he cried, said he didn't mean to do it and wanted to leave the city and join the job corps because he was teased and called crazy by his peers.

She also related that Brian does not have a girlfriend or does not seem interested in girls except to go to dances. He plays sports and is very particular about keeping himself clean and his room neat. He constantly is after his brother who shares his room to put things away.

He relates to his peer group by trying to be funny and making them laugh.

He started school in head start and went on to kindergarten and has not been left back or had behavior problems in school until a year ago when in 10th grade he began to truant. Mrs. Thomas went to the school and the truancy has stopped. She thinks Brian is easily led, anxious to maintain a good image and did it because it was the current style. He has always just managed to get passing grades and depends a great deal on his mother and older sisters to help him with homework. He is fond of drawing, frequently copying pictures from his comic books. Except for the truancy he has not been a problem at home or in the community.

Brian is a tall nice looking 16 year old boy who looks his age but seems immature, and relates in a flat and non-aggressive manner. He has very

little to say unless questioned directly, he worked on a leather bracelet while we were talking. He appeared to have borderline intelligence and his mood was bland. There is no evidence of a thought disorder.

He said he just manages to pass each year at school and asked that we arrange to have his school work brought to him so be wouldn't get behind. He showed me a picture of a superman which he had copied from a comic book. I was struck with the meticulous attention to detail and coloring.

He was willing to discuss his behavior with the horse, said he had heard other boys discussing shoving a broom up the horse but does not know why he tried it except that the horse was messing so much. He said he knows he is not crazy, denies that he meant to hurt or kill the horse and assured me that he would not do it again.

His behavior on the ward has been uneventful but the staff feels that he is only peripherally involved and not as active or assertive as they expect from a boy of his age.

In my opinion he is a boy who has a poor self image and a great deal of difficulty with his aggression and anger. This has interfered with his intellectual functioning and leaves him with a constant feeling of discouragement and frustration, so that

he is not only depressed but also extremely immature and dependent.

I would recommend that he be placed on intensive probation and that he be treated along with his family in outpatient family therapy. It might be very helpful for him to have a school program with some vocational emphasis.

Diagnosis – Passive-Aggressive Personality

/s/
Dwight R. Ashbey, M.D.

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[EXCERPT]

PENNSYLVANIA HOSPITAL
COMMUNITY MENTAL HEALTH
AND RETARDATION CENTER
[Address Omitted]

(x) TRANSFER/ (x) TERMINATION SUMMARY

PATIENT'S NAME: THOMAS, Brian

IN PATIENT: Admission Date: 9/15/75
Discharge Date: 9/26/75

* * * * *

ADMISSION PROBLEM/PREVIOUS TREATMENT SUMMARY:

This was the first psychiatric admission for this 16 year old, black, single male admitted to our unit through the Hall-Mercer Childrens' Service on a court commitment.

* * * * *

He was admitted for full evaluation following an isolated instance of violent behavior involving an assault upon an animal.

On admission, he was somewhat guarded and aloof. He showed no evidence of psychotic behavior or thought disorder throughout the hospitalization,

although he tended to be generally seclusive and unspontaneous. His affect was somewhat flattened. He displayed no violent or aggressive behavior at any time during his hospitalization.

Physical examination on admission was within normal limits. Routine laboratory studies showed elevations of alkaline phosphatase and inorganic phosphate which were considered to be within normal limits for a person his age. Other routine studies were within normal limits.

During the hospital course, the patient was generally seclusive and spent his time with drawings and school work, which he did in a very meticulous manner. He attended group therapy sessions, but contributed little to any discussion. He followed the rules and was no management problem at all. He was given a full psychiatric evaluation by the staff of the Childrens' Service and was also given a full set of psychological tests.

Neurological consultation was obtained and the neurological examination was fully within normal limits. EEG was also obtained and was read as normal.

The patient returned to the Family Court on 9/26/75 for a hearing. It was the recommendation of the evaluating staff that he be placed on probation with intensive family therapy during the time of probation.

* * * * *

/s/ Dana Charry, M.D.
(Signature) 10/25/75

App. 150

[EXCERPT]

PSYCHOLOGICAL SUMMARY

June 23, 1976

* * * * *

THOMAS, Brian (N) 17 Yrs.-2 Mo.

* * * * *

WAIS: Verbal I.Q. 84; Performance I.Q. 99; Full Scale I.Q. 90.

* * * * *

Of particular concern are the boy's social skills. He shows some insight into his immediate environment and is very alert to environmental detail. Comprehension and judgement, however, are very limited and this is frequently found in individuals who are attempting to be manipulative.

Projectively, Brian is a highly aggressive, expansive young man. He does not seem to feel the need for limits or restrictions and was sullen during much of the session. Although organic gross impairment is not indicated on the drawings or the Bender-Gestalt, there are suggestions of very poor control over aggressive impulses which may lead to explosive, impulsive behavior at any time. In addition, Brian shows little empathy for others. He is self-centered and very concerned about his own welfare.

Psychosexually, he is immature. Brian is very concerned about proving his masculinity, but the alleged offense of molesting a small girl suggests that he (1) Is not able to cope adequately with females of his own age and (2) He has little understanding of his social and moral responsibility.

It is mentioned in the record that minimal accomplishment has been made in therapy, therefore, correctional placement is suggested as I feel strongly that Brian will continue to get into difficulty unless he learns that he must obey restrictions and limits.

EVA WOJCIECHOWSKI
PSYCHOLOGIST

EW:MP

COMMON PLEAS COURT OF PHILADELPHIA
FAMILY COURT DIVISION
MEDICAL DEPT. MEMO

DATE October 13, 1976

TO The Honorable James L. Stern

FROM Dr. C. W. Orchinik
Chief, Psychological Services

SUBJECT THOMAS, Brian
J196481

This is an up-dated summary of this youth's progress. Brian Thomas was continued on out-patient treatment at the Hall-Mercer Mental Health Center after his 406 in-patient evaluation. Following the Court hearing on October 6, 1976, the youth was continued in family therapy on an out-patient basis at this Center. Follow-up on his progress, the report from that facility stated "there has been too little change to consider treatment as a success." Doctor Ashbey of Hall-Mercer requested that a residential setting be considered which would include vocational training for Brian.

Since that time, the youth reported in a psychiatric interview at this Court, that he had participated in further sexual deviation. Dr. Frignito observes "there is no doubt he is a sexual deviate with

sadistic tendencies. He has uncontrollable sexual impulses toward females and has also revealed sexual aggressivity and cruelty towards animals (incident of horses)."

The report also noted that "he is a serious threat in the community and needs to be placed in a correctional institution of maximum security . . . his sociopathic traits, his lack of insight, his lack of sensitivity or shame or guilt make for a poor prognosis with or without treatment.

Indication of more than one area of sexual deviations, including an alleged act against a child, leads us to urge a residential program that will give attention to both the anti-social sexual and sadistic potentials of this youth.

Success in treating such cases is poor. Prospects for significantly modifying his deviance are not good.

C. W. Orchinik, Ph.D.
Chief, Psychological Services

CWO/g

App. 154

[EXCERPT]

PSYCHOLOGICAL EVALUATION

STUDENT: Brian Thomas
DATE OF BIRTH: 4/06/59
DATES OF TESTING: 9/07/77 & 9/16/77

REASON FOR REFERRAL: Psychological testing has been requested by the supervisor, Mr. Serban, to see whether any improvement is revealed since this youth was last tested five months ago.

BACKGROUND: Brian is the third of five children who live with their mother in South Philadelphia. Their father died when Brian was ten. He is described by his mother as always having been extremely neat, even as an infant. As a child he often withdrew rather than defend himself in a conflict.

Brian was committed to the Youth Development Center at Cornwells Heights as a result of charges of sexually assaulting an infant girl (10/76). Prior charges include one of cruelty to animals resulting in the death of a horse (7/75). Following this incident Brian was a patient at Pennsylvania Hospital's Hall-Mercer Center for an evaluation in September 1975. He did not respond to therapy there, nor to the weekly family therapy sessions that followed. The health history describes a youth in good physical condition. There is note in the record

however of a fall from a truck (1970) which knocked him unconscious. A neurological examination and EEG done on 9/21/75 were within normal limits.

He last attended South Philadelphia High School where he was in the twelth [sic] grade.

BEHAVIORAL INFORMATION: This youth is a tall, quiet 18 year old who seemed to be on his best behavior. He has responded well to the program here, qualifying for a General Education Diploma. He is applying to community college.

He was cooperative throughout testing, conscientious about doing what was asked but he seemed unemotional and somewhat stiff. There were moments when he seemed to lose contact with what was going on around him and began talking soundlessly to himself.

* * * * *

RESULTS: Brian is presently functioning in the average range of intellectual ability. There is no significant change since he was last tested on 6/23/76 (Verbal IQ: 84; Performance IQ: 99; Full Scale IQ: 90). However, the summary scores have little or no meaning in understanding Brian because they mask his very erratic performance. Thus in the verbal area he has above average ability in logical thinking while his language development, range of knowledge, and common sense are all very inadequate.

In the performance area more of his abilities fall in the average range. His ability to differentiate essential from non-essential deatails [sic] is in fact well above average. Only the ability to interpret social situations is inadequate.

There were indications in the intellectual assessment of impaired thinking in addition to the bizarre behavior described above. For example, Brian answered an extremely difficult question readily but could not answer much easier ones. When asked the meaning of "Strike while the iron is hot", he said, "It's hot, don't touch it". Such quick concrete responses were frequently given.

Visual-motor perception as indicated by the Bender-Gestalt is satisfactory.

Projective testing reveals that deviations which might be expected do not take place. Although Brian was committed because of sex crimes, there is no disturbing anxiety in the test results related to sexual intercourse. There is, conversely, an indication of mental, if not motor, impulsiveness regarding psycholosexual [sic] intentions, active doings and passive experiences regardless of what they are. Apparently Brian is not ambivalent over his sexual tendencies and feels no anxiety in connection with them. This augurs ill for a possible change in his psychosexual attitude during psychotherapy.

Although Brian apparently experiences almost no conscious anxiety, fear of people and their intentions is very high. Testing reveals oppressive feelings of aloneness and insecurity.

Brian's responses are similar to those in the literature describing paranoid schizophrenia. However the results of testing also indicate a capacity for prolonged conscious control of thoughts and actions. Frequently his thinking is similar to that of the model student, eager to do and know what is expected. Since controls are good, nothing is likely to show in everyday behavior. What happens in serious mental illness is that sometimes unconscious tendencies slip out. In Brian's case this is the probable cause of the sex crimes.

Testing indicates that he is emotionally flat. He apparently is indifferent, without either feelings of love or hate for others. Over-control is indicated by strong unconscious inhibitions. When anxious he is likely to assume an attitude of watchfulness and restraint.

From the test results Brian appears to have at least above average intelligence and an intuitive understanding of others. Other strengths include a tendency to deal with reality, both physical and social, in his own way and a reluctance to deal with reality in a casual manner. Pride is important to him.

The job is likely to be treated by him as a means of personal improvement rather than social advancement. He seems to be self-motivated showing a reduced desire to be praised, a certain indifference to rewards.

Important changes have occurred in the record since Brian was last tested five months ago. Such changes are seen chiefly in a greater degree of submissiveneness, introversion, inhibition and anger. Earlier testing indicated that Brian wanted to cooperate; now it reveals that he is obsessive and blocked. The following responses may be considered self portraits. When he first came to the institution he perceived two people holding a basket. He now perceives the same stimulous [sic] as two people pulling in opposite directions something which is breaking. Such a change is for the worse. He is angrier now and therefore more dangerous. This kind of test response is likely to change last and least. Therefore the change itself is very significant. He is now obsessive enough about getting what he wants and angry enough that he cannot get it to the point of breaking it.

There are other changes in the record that are also significant. Brian now perceives "somebody crawling" which indicates a desire to play a submissively compliant role. This too is a dynamic self potrait [sic]. It means that he will seek out someone he must obey and who will take responsibility for making his decisions. Both submissiveness and

anger are definite attitudes that are new and important.

Another such role included in the test results is a tendency to be dependent on "stick or pole" in matters referring indirectly to sexual tension. This wish is likely to pertain to fantasy rather than actual social relations but may be acted out when he is delusional.

Previous testing revealed strong feelings of conscious anxiety regarding how to handle depression. There was evidence of a terrible fear of fear. Now little evidence of any conscious anxiety appears in the record. While it is generally considered a good thing for a healthy person not to feel anxious, a lack of anxeity [sic] is not a good sign in a criminal or psychotic. It is an indication that he is delusional, that he is expanding in order to feel secure.

SUMMARY: Brian is presently functioning in the average range of intellectual ability. From the wide scatter within individual subtests, it appears that when functioning near his best he is of high-average intelligence.

Personality testing reveals serious mental disturbance. While Brian may seem alright most of the time unconscious fantasies will find expression in outward behavior in spite of great efforts of control.

In response to the referral question although Brain [sic] may be better controlled and less anxious than he was, he is more dangerous now. Testing indicates a basic change of attitude, from one of cooperation to one of anger.

RECOMMENDATIONS:

1. Since Brian is a dangerous criminal he should not be permitted to return to the community. He should be maintained in a secure facility where his behavior can be closely monitored.

2. Specific plans for Brian should be worked out in a psychiatric consultation.

/s/
Iris Jourdan
Psychological Services Associate

* * * * *

App. 161

[EXCERPT]

* * * * *

COURT OF COMMON PLEAS
PROBATION DEPARTMENT
PSYCHIATRIC EVALUATION UNIT
ROOM 760-A, CITY HALL
PHILADELPHIA, PENNSYLVANIA 19107

* * * * *

MENTAL HEALTH EVALUATION

DEFENDANT'S NAME: THOMAS, BRIAN

DEFENDANT'S AGE: 26

DATE EXAMINED: 2-7-86

IDENTIFYING INFORMATION:

This is the second evaluation performed in this Clinic for this 26 year old (born 4-6-59), Black, male, formerly employed, licensed cosmetologist, who was born in Philadelphia, is presently incarcerated, and gives his home address as 5647 Wyndale Avenue, where he lives with his wife.

The present evaluation is performed at the 2-7-86 request of Judge Malmed, subsequent to a Guilty finding by Jury on charges of First Degree Murder,

Burglary, Rape and Involuntary Deviate Sexual Intercourse.

* * * * *

SUBJECT'S ACCOUNT OF PRESENT OFFENSE:

The Defendant tells me in a reasonable way that the case is under appeal, and he does not wish to discuss it in any way. He is aware of police allegations in the present Rape-Murder incident. He denies any knowledge of the incident, and says he did not know the Deceased.

SUBJECT'S RECENT LIFE SITUATION:

Since his arrest five months ago, he has been continuously incarcerated. He says he was held without bail. He also indicates that he had a Probation Violation Detainer placed against him. Prior to his arrest, he says he had been living with his girlfriend for about the last four years. He says they had been legally married a few months prior to this incident.

He says he was working steadily as a beautician, and had received his beautician's license about a year ago. He says he and his wife had been living in a rented apartment in the Wynnefield section of the city for about two years, and he says he was working at a beauty salon on City Line.

He says he had been released from Rockview Prison in 1982 after serving four-and-a-half years of a three-and-a-half to seven year sentence on a charge of Indecent, Simple and Aggravated Assault. He characterizes the case as "a child molesting" which he denies. He says he successfully completed parole on this case in November of 1984.

As described in my previous report, he admits using Marijuana on a fairly regular basis for the last several years, and began using this drug while at Rockview. Prior to this arrest, he says he was using Marijuana occasionally on weekends, but says he never bought the drug and used it only on a social basis. He denies heavy use of alcohol at any time, and says he usually drinks only a few Beers.

However, he does have some history of alcoholic blackouts in the past which he characterizes as having only occasionally, and denies any such loss of memoroy [sic] at around the time of this incident.

* * * * *

CURRENT MENTAL STATUS:

In the interview today, he presents himself as a casually dressed, neaty [sic] groomed, tall, athletically built, Adult, Black male, who is 6'3" tall and weighs 190 pounds. During the interview, he

answers questions in quite a guarded, tense voice, but is coherent and relevant in his response, although not particularly spontaneous.

His thoughts progressed in a normal associative manner with no indication of a formal thought disorder and no suggestion of perceptual abnormalities in the form of delusions or hallucinations. He also denies referential ideas, but does express some general paranoid distrust and feelings of expansiveness, and is particularly guarded and distrustful of the Court System, and says, "You can't trust anybody in Court," and indicates that he also feels this way about his lawyer to some extent.

He is oriented in all three spheres, and his memory and intellectual functioning are intact. Fund of information appears guarded. He is literate and appears to be of about upper average intelligence. However, his response on social judgement questions, as indicated in my previous interview, remains rather poor. He is indicating dyssocial ideas which appear well-ingrained, and his social perceptions and thinking have a distinctive arbitrary quality.

Regarding his present mood, he expresses feelings of depression, particularly since he was given the Death Penalty this morning, however, he does not appear severely depressed, denies any suicidal ideation, but says he had a few vague ideas about this yesterday after he heard the Guilty Verdict.

There does not appear to be any suicidal intent within this individual, and he does tell me quite clearly that he wishes to appeal and continue to fight the case.

Regarding his handling of anger, he tends to deny and minimize explosive outbursts, however, it is my impression that there is a great deal of explosive agitation within this individual. He says he would never be involved in a fight unless someone put their hands on him, however, it appears that he would then feel quite justified in acting with great aggression. He says he would pick up a weapon at hand, "if I felt I couldn't beat the person otherwise." Again, his thinking reveals quite an arbitrary, personalized quality, in which he tends to feel that his actions and his aggression are justified. He remains wholly without insight, and his defense mechanisms of massive denial are quite well-ingrained.

PSYCHOLOGICAL ASSESSMENT:

At the present time, this Defendant can be best described as suffering from Severe Multiple Personality Disorders, and continues to indicate Sociopathic, Reactive Paranoid and Schizoid Traits. There is continued indication, both clinically as well as on psychological testing, of a great deal of underlying psychopathology which is clearly focused in the sexual area, with indication of sexual identity confusion, hostility and ambivalence

toward women, and indication of very primitive, brittle, and inadequate controls.

RECOMMENDATIONS:

This Defendant is competent to receive a sentence. There are no psychological factors which would interfere with the sentencing process. As noted in my previous report, he is not a good candidate for psychotherapy or psychological treatment, as he remains quite defensive, and his massive denial is well-ingrained. It should be noted that the underlying psychopathology within this individual appears quite active and unresolved, and his long term prognosis must be considered quite poor.

/s/
LAWRENCE BYRNE, M.Ed.,
LICENSED PSYCHOLOGIST

LB:rmn

4-16-86

No 09-527

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A BEARD, Secretary, Pennsylvania Department of Corrections, et al ,

Petitioners,

v

BRIAN THOMAS,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

DAVID WYCOFF, ESQ
Assistant Federal Defender
LEIGH M SKIPPER, ESQ
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520

Counsel for Respondent, Brian Thomas

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

In this capital habeas case, Respondent (the habeas petitioner below) submitted that he received ineffective assistance of counsel at capital sentencing. Respondent proffered that counsel did no investigation for mitigating evidence. As to prejudice, Respondent proffered that he has had a major mental illness since childhood, paranoid schizophrenia, which mitigates in a capital case. Respondent supported the proffer with professional reports about his mental illness that predated the offense and trial. Respondent made a similar submission in the state courts, which denied relief without allowing a hearing.

The District Court granted relief from the death sentence. The United States Court of Appeals for the Third Circuit reversed. The Court of Appeals held that the District Court should not have granted relief but, given Respondent's proffer and the absence of a state court hearing, should have held an evidentiary hearing. The Court of Appeals remanded for a hearing.

Although Petitioners here (the Commonwealth of Pennsylvania) prevailed in the Court of Appeals, they now seek certiorari. The questions they have presented are properly restated as follows:

> Should this Court grant certiorari when the Petitioners' "Questions Presented" are not actually at issue, and where the actual certiorari argument provides little more than a party's disagreement with the Court of Appeals' fact-intensive application of settled law?

PRELIMINARY STATEMENT REGARDING CITATIONS

All emphasis herein is supplied unless otherwise indicated

Parallel citations usually are omitted

Transcripts in Pennsylvania are called "Notes of Testimony" and are cited herein as "NT "

Petitioners filed an Appendix containing lower court opinions and some documents, which is cited herein as "App "

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PROCEDURAL HISTORY

Mr Thomas was convicted of first degree murder and sentenced to death in the Philadelphia Court of Common Pleas, the Pennsylvania Supreme Court affirmed, Commonwealth v Thomas, 561 A 2d 699 (Pa 1989) ("Thomas-1"), and state post-conviction relief was denied without allowing an evidentiary hearing, Commonwealth v Thomas, 744 A 2d 713 (Pa 2000) ("Thomas-2")

The United States District Court denied habeas relief with respect to the conviction, but granted relief from the death sentence Thomas v Beard, 388 F Supp 2d 489 (E D Pa 2005) ("Thomas-3"), partially reproduced at App 53-119

The Third Circuit affirmed the denial of guilt-phase relief, but *reversed* the grant of penalty-phase relief, holding that the District Court erred in granting relief without holding an evidentiary hearing Thomas v Horn, 570 F 3d 105 (3d Cir 2009) ("Thomas-4"), App 1-52 The Circuit remanded with orders that an evidentiary hearing be held

Petitioners ("the Commonwealth") seek certiorari review of the Third Circuit's remand order In seeking review, the Commonwealth repeatedly inaccurately asserts that the "Third Circuit *affirmed the grant of sentencing relief*" Petition at 11, see also note 7, infra (quoting Petition)

Actually, the Third Circuit *reversed* the District Court's grant of sentencing relief, and ordered an evidentiary hearing For this reason, and other reasons described herein, this Court should deny certiorari

COUNTERSTATEMENT OF THE CASE

A. Trial and Capital Sentencing

In August 1985, Mr Thomas was arrested and charged with killing Linda Johnson The offense was disturbing and bizarre See Petition at 2 (describing offense), Thomas-4, App 4 (same)

Two weeks after his arrest, Mr Thomas "attempted suicide" by "slash[ing] his wrists and slash[ing] his neck with a razor blade " NT 1/28/86 (suppression hearing) at 183, see also id at 184 (he "attempted suicide" and "attempted to end his life") Mr Thomas told a detective he tried to kill

himself "because he was charged with murder and he was placed in the company of a number of crazy people and wanted to die." Id. at 183. Mr. Thomas' suicide attempt "suggests a rather substantial degree of mental instability."[1] Yet trial counsel did not seek a mental health evaluation or investigate Mr. Thomas' mental health.

Mr. Thomas was tried in February 1986. The jury convicted on first-degree murder. Before capital sentencing, defense counsel moved for imposition of a life sentence, but counsel made no coherent argument and the court denied the motion. See NT 6.19-24. At sentencing, the Commonwealth sought three aggravating factors – "1) killing while perpetrating another felony, namely rape, 2) killing by means of torture, and 3) a significant history of violent felony convictions. See 42 Pa. Cons. Stat. § 9711(d)(6), (8), (9)." Thomas-4, App. 5. The (d)(6) and (d)(8) aggravators were based upon the guilt-phase evidence. Thomas-4, App. 5, Thomas-3, App. 56. For (d)(9), the Commonwealth presented a "1978 conviction for felonious aggravated assault and indecent assault on a three-year old, which caused injuries to the child's rectum and intestines," and a "1984 conviction for criminal trespass where Thomas unlawfully entered a neighbor's bedroom" and "climbed into bed with her while she was sleeping." Thomas-4, App. 5-6, Thomas-3, App. 56.

Defense counsel rested without presenting any mitigating evidence. NT 6.44. The jury was removed. The court asked counsel if Mr. Thomas would testify, and if it was "the defense intention to present any evidence on mitigating circumstances." NT 6.45-46. Counsel answered "no" to both questions. Id. Counsel and the court asked Mr. Thomas if he wished to testify, he said he did not. See NT 6.46-47. Counsel had not informed Mr. Thomas of who could have been presented as mitigation witnesses. Thus, when the prosecutor asked "Mr. Thomas, do you have any witnesses that you would like to call at this time at this stage at this proceeding?" NT 6.49. Mr. Thomas said "no." Id. The court said "You mean no, you don't have any witnesses to call?" Id. Mr. Thomas

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[1] Drope v. Missouri, 420 U.S. 162, 181 (1975), see also Kaplan & Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1739 (6th ed.) ("CTP") ("close association of suicide [attempts] with psychiatric disorder"), id. at 1749 (same).

said "Right." Id. The prosecutor offered "to stipulate to the defendant's current age and his date of birth and the fact that the defendant is a high school graduate." NT 6-50. Counsel declined the stipulation. Id.

When the time came for closing arguments, defense counsel, showing his lack of familiarity with capital sentencing procedures, asked "Does the Commonwealth go first?" NT 6-51. The court responded "You go first." Id.

Defense counsel gave his argument. The District Court and the Third Circuit both found that "counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment" and that counsel "wholly failed in his duty to present a closing argument helpful to Thomas." Thomas-4, App. 8 n.1 (quoting Thomas-3), see also Thomas-3, App. 95-98 (quoting counsel's argument). The Commonwealth did not challenge this finding in the Third Circuit, and does not challenge it here.

"The jury found the three proposed aggravating circumstances and no mitigating circumstances. Accordingly, Thomas was sentenced to death." Thomas-4, App. 6.

B. Mr. Thomas' Proffer Regarding Ineffective Assistance of Counsel at Capital Sentencing

Post-conviction, Mr. Thomas asserted that counsel was ineffective at capital sentencing because counsel (1) failed to investigate Mr. Thomas' life history and mental health for mitigation, (2) gave an inept and harmful closing argument, and (3) failed to reasonably advise Mr. Thomas about mitigating evidence and capital sentencing. Mr. Thomas requested an evidentiary hearing.

1. Mr. Thomas proffered that counsel failed to investigate his life history and mental health. In support of that proffer, Mr. Thomas noted that at the time of sentencing there was

> no proffer from counsel identifying the investigative measures he had undertaken, or what evidence he was prepared to present. Additionally, a search of the state court file, where Thomas' court-appointed counsel and the court would have lodged certain case-related documents, yielded nothing suggesting an investigation-no request for a mitigation investigator, no request for funds for a mitigation investigation, no request for a defense mental health expert, and no subpoenas for mental health records. Had Thomas' counsel performed any investigation, we would expect either

some mention of it in open court or some "paper trail" suggesting it in the record of proceedings The absence of both implies that counsel did no investigating

Thomas-4, App 38

Mr Thomas also proffered compelling mitigating evidence that was available to trial counsel, upon reasonable investigation, which shows that Mr Thomas suffered a deprived childhood in a violent, inner-city housing project, that he had a lifelong history of mental illness so severe that it required psychiatric hospitalizations, that he suffered at the time of the offense from serious mental illnesses that included paranoid schizophrenia, and that, despite his serious mental problems, he had warm and loving relationships with family members

The documentary evidence of Mr Thomas' mental illness begins in 1975 when, *at age sixteen*, he was committed to a psychiatric hospital for evaluation and treatment under § 406 of Pennsylvania's Mental Health and Mental Retardation Act, 50 P S § 4406 See Report of Psychologist Patricia Sullivan (Sept 1975) ("Sullivan Report"), partially reproduced at App 139-42, Report of Dana Charry, M D (Sept 1975) ("Charry Report), partially reproduced at App 147-49, Report of Dwight Ashbey, M D (Sept 1975) ("Ashbey Report"), partially reproduced at App 143-46 The law allowed such a commitment only for someone who was "*mentally disabled* and in *need of care or treatment* by reason of such *mental disability*" 50 P S § 4406(a)

The fact that sixteen year old Brian Thomas was found "mentally disabled and in need of care," and psychiatrically committed, shows he was suffering from serious mental problems The expert reports created at the hospital during his commitment confirm this

The mental hospital reports state that sixteen year old Brian Thomas was committed after a strange incident in which, while working in a stable, he stuck a broom handle into horses' anuses Sullivan Report at 1, Ashbey Report at 1 "Just prior to the act, Brian had completed cleaning the stables when the horses again began to defecate He reported someone suggested he should stick the handle of the broom up into the horse's anus to stop him from going Brian apparently did this without thinking that he could seriously injure the horse(s) in this way" Sullivan Report at 1

Before this incident Brian had a "lack of school and legal violations," Sullivan Report at 2, and had "not been a problem at home or in the community," Ashbey Report at 2

Later records suggest, and the post-conviction mental health expert found, that Mr Thomas suffers from schizophrenia Signs of this disease, such as Brian's strange behavior with the horses, typically begin to manifest themselves at about this age (sixteen) See CTP at 890, 908 (psychotic symptoms of schizophrenia "usually manifest[] during late adolescence and early adulthood," with men "most likely to have the onset of symptoms between ages 15 and 25"), DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 281 (4th ed) ("DSM-IV") (similar) As here, the "onset of schizophrenia tends to be characterized by idiosyncratic responses to ordinary events or circumstances," CTP at 899, and "frequently evokes responses from the affected person that are interpreted as dangerous either to the person or others " CTP at 973

The mental hospital doctors reported that Brian showed no insight into his actions The doctors reported that Brian "does not know why he tried it except that the horse was messing so much " Ashbey Report at 1 On psychological testing, he finished the incomplete sentence "I'd like to know" by saying "what made me do it," and finished the incomplete sentence "I can't understand" by saying "why I did it " Sullivan Report at 3 Such "[l]ack of insight is common" among those suffering from schizophrenia DSM-IV at 279 "When he heard the horse had died he cried, said he didn't mean to do it and wanted to leave the city and join the job corps because he was teased and called crazy by his peers " Ashbey Report at 1

Throughout his psychiatric hospitalization, Brian was found to be "guarded," "aloof," "seclusive" and "unspontaneous " Sullivan Report at 2, Charry Report Doctors noted his "flat affect " Sullivan Report at 2, Ashbey Report at 2, Charry Report He had "very little to say," "never offered any spontaneous verbalizations and responded to questions only in a brief way " Ashbey Report at 2, Sullivan Report at 2 His mother reported that he tries to "hold[] in his anger and frustration " Ashbey Report at 1 Doctors also noted that Brian was strangely "meticulous" and

obsessed with "neatness and order" Charry Report, Ashbey Report at 2, Sullivan Report at 2-3 Again, these symptoms are consistent with the onset of schizophrenia [2]

Psychologist Sullivan found that sixteen year old Brian Thomas'

> constricted and inadequate emotional resources create considerable adjustment problems Definite difficulties in handling aggressive and sexual impulses are noted [H]is generalized constriction and lack of affective differentiation make Brian insensitive to the emotional impact of everyday life as well as blocking awareness of inner feelings Simply worded, he lacks verbal labels and awareness of outlets for expression of emotions Brian experiences the strength of his impulses but is unable to conceptualize few ways to handle them An over criticalness manifesting itself in compulsivity contribute to the constriction and serve as defenses in managing these impulses Brian has an absence of imaginal resources making even fantasy unusable as an outlet

Sullivan Report at 2

Psychologist Sullivan found that Brian's bizarre behavior stemmed directly from his mental problems – it was a "manifestation of problems in handling his aggressive and sexual impulses," and a "loss of control and regression to a primitive level" Sullivan Report at 2 Because of his mental infirmities, he lacked "the sense to verbally share his feelings or to quit the job" and, instead, "impulsively act[ed] out his pent up rage" Sullivan Report at 2 Because of his "pent up rage," "very shallow emotionality," "rigidity and poor judgment[,] Brian saw no alternative to what he did" Sullivan Report at 3

Psychologist Sullivan noted a dysfunctional relationship between Brian and his mother She

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[2] See CTP at 976 ("flat or blunted affect is common" in those suffering from schizophrenia), DSM-IV at 276 (same), CTP at 975 ("Many patients with schizophrenia tend to be monosyllabic and to answer questions as briefly as possible"), DSM-IV at 276 ("Alogia (poverty of speech) is manifested by brief, laconic, empty replies"), CTP at 974 ("Social withdrawal is a common symptom in schizophrenia"), CTP at 899 ("onset of schizophrenia tends to be characterized by increasing emotional withdrawal, [and] diminishing social engagement and social drive [S]ocial interaction, and emotional responsivity gradually erode"), CTP at 972-73 ("person with schizophrenia often evinces steady patterns of withdrawal, moodiness, and a disinclination to relate emotionally"), CTP at 976 ("Many patients with schizophrenia seem to be indifferent (or, at times, totally apathetic) Others with less marked emotional restriction, or blunting, show emotional shallowness"), CTP at 973 (neatness "may become an overriding preoccupation" in those suffering from schizophrenia)

observed that a "hostile-dependent mother-child relationship is quite evident," and believed Brian's "rage is no doubt a transference of an anger more appropriately directed towards his unsatisfactory relationship with both his parents." Sullivan Report at 2. His impulsive actions, however, were "done unconsciously" and without "awareness of the original anger." Sullivan Report at 3.

> His insensitivity to his environment and lack of awareness of inner feelings make it difficult for him to understand and control his aggressive and sexual impulses. He has in the past managed to do so but at the price of much frustration and pent up rage. The situation [at his stable-cleaning job] attacked the defenses which he had erected for dealing with these impulses. His neatness and orderliness served to keep his world in order. With the horses constantly and uncontrollably 'messing' he could no longer control himself.

Sullivan Report at 3.

The psychiatric hospital doctors also noted that Brian had learning problems. In school, he "always just managed to get passing grades and depends a great deal on his mother and older sisters to help him with his homework." Ashbey Report at 2. Brian confirmed that "he just manages to pass each year at school and asked [the doctors] that we arrange to have his school work brought to him so he wouldn't get behind." Ashbey Report at 2.

The doctors believed Brian was of average/low-average intelligence, but was functioning at a *significantly lower* intellectual level because he was mentally disturbed. See Sullivan Report at 2 ("There is no doubt that Brian functions at an intellectual level significantly below his capacity. His constricted and inadequate emotional resources contribute to this difficulty as well as create considerable adjustment problems."), id. at 3 ("Brian's inadequate and constricted emotional development contribute to his functioning intellectually at a level lower than indicated by his potential."), Ashbey Report at 2 (Brian "appeared to have borderline intelligence", he is "a boy who has a poor self image and a great deal of difficulty with his aggression and anger. This has interfered with his intellectual functioning and leaves him with a constant feeling of discouragement and frustration, so that he is not only depressed but also extremely immature and dependent.") Since serious mental illness interferes with cognitive functions, Brian's deficient intellectual functioning

is another sign of his developing mental disease E g , DSM-IV at 633, CTP at 1425

The 1975 psychiatric commitment records also contain some life history information Brian lived with his family in an apartment in an inner-city housing project Sullivan Report at 1 "Brian is the oldest boy in a family consisting of mother and four siblings " Ashbey Report at 1 His parents were living together when he was born, but "Brian was an unplanned child" and the "marriage ended shortly after he was born " Id As a result, he "had no consistent relationship with his father," and his "younger siblings have a different father " Id "His father died when Brian was ten years old " Id Brian had "an unsatisfactory relationship with both his parents," and a "hostile-dependent mother-child relationship is quite evident " Sullivan Report at 2 Brian's mother reported that he "continued to wet the bed at night until he was thirteen " Ashbey Report at 1 She described him as "the most immature and dependent of her children " Id At the same time, however, she also said he was "the most helpful and considerate child " Id

Brian was able to adjust to the controlled psychiatric hospital environment He "displayed no violent or aggressive behavior at any time during his hospitalization," Charry Report, he "followed rules and was no management problem at all," id , he "relate[d] in a non-aggressive manner," Ashbey Report at 2, and his "behavior on the ward [was] uneventful," id Again, this is consistent with Brian's developing mental illness Mentally ill people can adjust positively to a structured institutional environment, such as a hospital, the structure was especially helpful to Brian

Doctors at the hospital also believed that sixteen year old Brian suffered from a personality disorder See Charry Report, Ashbey Report at 2 Personality disorder is a serious mental disturbance that adversely affects "cognition (i e , ways of perceiving and interpreting self, other people and events)," "affectivity (i e , the range, intensity, lability, and appropriateness of emotional responses)," "interpersonal functioning" and "impulse control", causes "clinically significant distress or impairment in social, occupational, or other important areas of functioning", is "inflexible and pervasive across a broad range of personal and social situations", and is "enduring," "of long

duration and can be traced back at least to adolescence or early childhood " DSM-IV at 633, CTP at 1425 The mental impairments associated with personality disorder frequently result in psychiatric hospitalization and self-destructive behavior See CTP at 1426-27, 1431

Brian was discharged from the psychiatric hospital in late September 1975 He told doctors he needed to continue to have contact with them after discharge Sullivan Report at 3 The doctors recommended "that he be placed on probation with intensive family therapy " Charry Report, see also Ashbey Report at 2 (he should "be placed on intensive probation and treated along with his family"), Sullivan Report at 3 ("strongly suggested that psychiatric treatment be mandated for the Thomas family")

During 1976-77, Brian was evaluated by mental health experts from the Philadelphia Court of Common Pleas and Cornwells Heights Youth Development Center See Report of Psychologist Eva Wojciechowski (June 1976) ("Wojciechowski Report"), partially reproduced at App 150-51, Report of C W Orchinik, Ph D (Oct 1976) ("Orchinik Report"), reproduced at App 152-53, Report of Psychological Services Associate Iris Jourdan (Sept 1977) ("Jourdan Report"), partially reproduced at App 154-60 These evaluations show he was mentally deteriorating

The 1976 reports show that seventeen year old Brian was reading at a *fourth grade* level, which was "lower than that of a year ago", his "[c]omprehension and judgment are very limited", he had "little insight", he had very poor "social skills", psychological testing showed "very poor control over aggressive impulses which may lead to explosive, impulsive behavior at any time", and he "has uncontrollable sexual impulses " Wojciechowski Report at 1, Orchinik Report The experts believed his prognosis was "poor," and he needed to be in an institutional setting Orchinik Report, Wojciechowski Report at 2

By the time of the 1977 evaluation, it was clear that Brian was severely mentally ill He was suffering from "*serious mental disturbance*," with test results consistent with "*paranoid schizophrenia*", he was "*psychotic*" and "*delusional*" and suffered from "*impaired thinking*,"

"*bizarre behavior*" and "*los[ing] contact*" *with reality*, and he was deteriorating

He was cooperative throughout the testing conscientious about doing what was asked but he seemed unemotional and somewhat stiff There were moments when he *seemed to lose contact with what was going on around him and began talking soundlessly to himself*

* * *

Brian is currently functioning in the average range of intellectual ability However, the summary [IQ] scores have little or no meaning in understanding Brian because they mask his *very erratic performance* Thus in the verbal areas he has above average ability in logical thinking while his language development, range of knowledge, and common sense are all very inadequate

* * *

There were indications in the intellectual assessment of *impaired thinking* in addition to the *bizarre behavior* described above For example, Brian answered an extremely difficult question readily but could not answer much easier ones When asked the meaning of "Strike while the iron is hot," he said, "It's hot, don't touch it " Such quick *concrete responses* were frequently given

* * *

Although Brian apparently experiences almost no conscious anxiety, *fear of people and their intentions is very high* Testing reveals *oppressive feelings of aloneness and insecurity*

Brian's responses [on testing] are similar to those in the literature describing *paranoid schizophrenia* However, the results of testing also indicate a capacity for prolonged conscious control of thoughts and actions Frequently his thinking is similar to that of the model student, eager to do and know what is expected Since controls are good, nothing is likely to show in everyday behavior What happens in *serious mental illness* is that sometimes *unconscious tendencies slip out* In Brian's case *this is the probable cause of the sex crimes*

Testing indicates that he is *emotionally flat* , without feelings of love or hate for others Over-control is indicated by strong unconscious inhibitions

* * *

Important changes have occurred in the record since Brian was last tested five months ago Such changes are seen chiefly in a greater degree of submissiveness, introversion, inhibition and anger Earlier testing indicated that Brian wanted to cooperate, now it reveals that he is obsessive and blocked *Such change is for the worse*

* * *

Another test result[] is a tendency to be dependent on "stick or pole" in matters referring indirectly to *sexual tension* This wish is likely to pertain to fantasy rather than actual social relations but *may be acted out when he is delusional*

Previous testing revealed strong feelings of conscious anxiety regarding how to handle depression There was evidence of a terrible fear of fear Now little evidence of any conscious anxiety appears in the record While it is generally considered a good thing for a healthy person not to feel anxious, a lack of anxiety is not a good sign in a criminal or *psychotic* It is an indication that *he is delusional*,

that he is expanding in order to feel secure

SUMMARY Personality testing reveals *serious mental disturbance* While Brian may seem alright most of the time *unconscious fantasies will find expression in outward behavior in spite of great efforts of control*

Jourdan Report at 1-3 It was recommended that Brian "be maintained in a secure facility where his behavior can be closely monitored" and he could be given "psychiatric consultation " Jourdan Report at 3-4

The Jourdan Report also contains some "background" information, including that Brian was "described by his mother as always having been extremely neat, even as an infant", as "a child he often withdrew rather than defend himself in a conflict", his "father died when Brian was ten", and he suffered a head injury when he had a "fall from a truck (1970) which knocked him unconscious " Jourdan Report at 1

All of the above-described records were created long before trial The post-conviction proffer is that they were *not obtained or used in any way by trial counsel*

Another court-ordered mental health evaluation was performed immediately after trial On the day after the jury sentenced him to death, Mr Thomas was seen (briefly) by court psychologist Lawrence Byrne, M Ed See Byrne Report, partially reproduced at App 161-66 Psychologist Byrne's report, like the above-described pre-trial records, shows serious mental problems

Psychologist Byrne noted that Mr Thomas had a "history of alcoholic blackouts", he was "guarded" and "tense", he suffered from "paranoid distrust and feelings of expansiveness", his "[f]und of information appears guarded", his "social judgment" is "poor", "his social perceptions and thinking have a distinctively arbitrary quality", "his thinking reveals quite an arbitrary, personalized quality", "there is a great deal of explosive agitation within this individual", "He remains wholly without insight, and his defense mechanisms of massive denial are quite well-ingrained", "There is continued indication, both clinically as well as on psychological testing, of a great deal of underlying psychopathology which is clearly focused in the sexual area, with indication of sexual identity confusion, hostility and ambivalence toward women, and indication of very

primitive, brittle, and inadequate controls", "his long term prognosis must be considered quite poor." Byrne Report at 3-4

Psychologist Byrne concluded that Mr Thomas "suffer[s] from *Severe Multiple Personality Disorders*," with "Sociopathic, Reactive Paranoid, and Schizoid Traits." Byrne Report at 4 As described above, personality disorders are serious mental disturbances Psychologist Byrne found the disorders to be "severe" in Mr Thomas These disorders found by Psychologist Byrne are rooted in abnormal brain structure, genetic makeup and traumatic childhood experiences E g , CTP at 1430 ("heavy genetic contribution to antisocial personality" disorder), id at 1435 ("being the recipient of irrational and overwhelming parental rage may lead to" paranoid personality disorder), id at 1435 (paranoid personality disorder may have "shared genetic and environmental and causal factors" with delusional disorder), id at 1438 (antisocial and schizoid personality disorders "have important developmental sources – most notably, traumatic early childhoods and markedly disturbed family environments"), id at 1442 ("risk factors for the development of antisocial personality disorder include childhoods marked by erratic, neglectful, harsh, and physically abusive parenting, poverty, an urban setting, [and] poorly structured early schools"), id at 1442 ("genetic factors can be influential in the development of" antisocial personality disorder), id at 1443 (antisocial personality rooted in "chaotic family and developmental histories"), id at 1445 ("patients with schizoid personality disorder often have histories of grossly inadequate, cold, or neglectful early parenting"), DSM-IV at 647-48 (antisocial personality disorder rooted in genetic factors, "[c]hild abuse or neglect, unstable or erratic parenting")

Psychologist Byrne's "schizoid" and "paranoid" findings signified that Mr Thomas suffered "a pervasive pattern of detachment from social relationships and a restricted range of expressions of emotions in interpersonal settings," and "pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent." DSM-IV at 634, 638, CTP at 1434, 1444 "Particularly in response to stress," people with these disorders "may experience psychotic episodes (lasting

minutes to hours)" DSM-IV at 635, 639, CTP at 1435 Those suffering from these disorders are at higher risk for other mental problems, in particular, "schizoid personality disorder may also be related to – and thus share causal sources with – schizophrenia" DSM-IV at 635, 639, CTP at 1435, 1444-45

In addition to the above-described documentary evidence, the post-conviction proffer includes evidence from family members who describe Mr Thomas' difficult life history and mental problems, and also provide positive information about him See Affidavits of Sara Thomas (mother), App 131-32, Cynthia Thomas (sister), App 133-34, Lorenzo Thomas (brother), App 135-35, Valerie Thomas (sister), App 137-38, Gladys Chapman (aunt) (not in Appendix) The post-conviction proffer is that these family members were available at the time of trial and would have testified had defense counsel talked to them about Mr Thomas' life and asked them to testify

The family members report that Brian Thomas grew up in an inner-city housing project at a time when it was plagued by extreme violence, including frequent shootings When he was about twelve years old, he suffered a head injury and was knocked unconscious when he fell from the back of a truck moving at thirty miles per hour He had a long history of bizarre behavior, leading his peers to call him "crazy" He spoke with and saw people who were not there He was out of touch with his surroundings He had sudden, unpredictable, severe mood swings Family members also state that, despite his mental problems, he had many positive traits, which included close, loving relationships with his family, helpfulness and acts of kindness to family members and neighbors, willingness to work hard and contribute money to his family, and encouraging his siblings to stay off drugs Family members state that his execution would be a devastating loss to them

Post-conviction counsel provided the above-described information, along with other information about Mr Thomas' history and the offense, to an experienced forensic psychologist, Dr Patricia Fleming Dr Fleming evaluated and tested Mr Thomas and highlighted information that a mental health expert could have presented at sentencing, had counsel adequately investigated See

Affidavit/Declaration of Dr Patricia Fleming ("Fleming Aff"), App 125-28

Dr Fleming explains that Mr Thomas suffers, and for years before the offense had suffered, from "a major mental illness" which meets the diagnostic criteria of "paranoid schizophrenia" Fleming Aff "Schizophrenia is one of the most severe of the major mental illnesses People who suffer from schizophrenia are seriously and substantially impaired in their functioning, have problems with cognition, have difficulties in thinking clearly, logically and rationally, and suffer from delusions and/or hallucinations" Fleming Aff, see also CTP at 889 ("Schizophrenia is a disease of the brain that manifests with multiple signs and symptoms involving thought, perception, emotion, movement, and behavior [T]he cumulative effect of the illness is always severe and usually long-lasting")

In short, Mr Thomas' post-conviction proffer is that trial counsel did no investigation whatsoever into Mr Thomas' life history and mental health, and that reasonable investigation by trial counsel would have led to the development of significant mitigating evidence

2. Mr Thomas' proffer regarding counsel's ineffectiveness also includes the argument counsel made to the jury at sentencing As both the District Court and the Third Circuit found, "counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment", counsel "wholly failed in his duty to present a closing argument helpful to Thomas" Thomas-4, App 8 n 1 (quoting Thomas-3), see also Thomas-3, App 95-98 (quoting counsel's argument) The Commonwealth did not defend counsel's argument below and does not defend it now

3. Mr Thomas' proffer regarding counsel's ineffectiveness, supported by a sworn affidavit from Mr Thomas himself, also includes counsel's failure to reasonably advise Mr Thomas about the nature and availability of mitigating evidence Counsel failed to inform Mr Thomas that mitigating evidence is very broadly defined, and includes matters such as Mr Thomas' mental problems and life history The result was that Mr Thomas "did not understand the nature and

purpose of mitigating evidence " Thomas-4, App 35 Because of counsel's inadequate advice, Mr Thomas erroneously believed that mitigating evidence encompassed *only* "evidence relating to the *circumstances of the offense* " Affidavit of Brian Thomas, App 129 Mr Thomas did not know he could present mitigating evidence about his mental illness and life history, or that such evidence could help him at capital sentencing

C. The State Courts' Treatment of the Ineffective Assistance of Counsel Claim

On direct appeal, Mr Thomas was represented by new counsel, who raised a limited ineffective assistance of counsel claim based upon Mr Thomas' affidavit stating that he "did not understand the nature and purpose of mitigating evidence," Thomas-4, App 35, because trial counsel led him to erroneously believe that mitigating evidence encompassed *only* "evidence relating to the *circumstances of the offense*," Affidavit of Brian Thomas, App 129

The Pennsylvania Supreme Court did not address the assertion actually presented by Mr Thomas Instead, the Pennsylvania Supreme Court mischaracterized the claim as being that "trial counsel did not advise [Mr Thomas] that he could put on evidence of mitigating circumstances," and then denied that assertion by stating that the "record plainly belies this allegation," i e , the record shows Mr Thomas knew he could present mitigation Thomas-1 at 710

As the Third Circuit observed, Mr Thomas never made the claim the Pennsylvania Supreme Court addressed – he never claimed he did not know he could present mitigation Instead, Mr Thomas "raised a completely different issue he asserted that he did not understand the *nature and purpose* of mitigating evidence " Thomas-4, App 35 (emphasis in Thomas-4) *The Pennsylvania Supreme Court did not address the issue actually raised*

In state post-conviction, Mr Thomas asserted that counsel was ineffective for failing to investigate mitigating evidence about Mr Thomas' life history and mental disturbances, failing to make an adequate closing argument, and failing to advise Mr Thomas about the nature and purpose of mitigation Mr Thomas requested an evidentiary hearing

The state post-conviction trial court denied relief without allowing a hearing It held that the "the issue of the advice given by counsel regarding [Mr Thomas'] right to introduce mitigating circumstances" was "previously litigated" on direct appeal and therefore "not subject to additional [post-conviction] review " App 121 [3] The state post-conviction trial court also said Mr Thomas had not shown "prejudice " App 122-23 This no-prejudice ruling, however, considered *only* the proffer from some of Mr Thomas' family members that "he had some *good character traits*, so that his life has merit and that his execution would be devastating to the family " App 122 The court *did not address or consider* any of the mental health and dysfunctional life history mitigating evidence described in § B, supra [4]

On post-conviction appeal, the Pennsylvania Supreme Court affirmed the denial of relief, stating that Mr Thomas' ineffectiveness claim had "previously been decided by this Court on direct appeal" – the "issue of the presentation of mitigating evidence, in all its possible manifestations, was determined by this Court's previous decision " Thomas-2 at 714 & n 3 See note 3, supra

D The District Court's Grant of Sentencing Relief

The District Court granted relief from the death sentence based upon the above-described ineffective assistance of counsel claim Mr Thomas requested an evidentiary hearing, but the District Court found "no need to hold an evidentiary hearing" because it believed "the evidence on the record is sufficient to demonstrate a Sixth Amendment violation " Thomas-3, App 88-89 n 15

Because the District Court granted sentencing relief on this claim, it declined to address two of Mr Thomas' other constitutional challenges to the death sentence See App 8 n 3

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[3]As this Court recently observed, this is neither a procedural bar ruling nor a merits ruling See Cone v Bell, 129 S Ct 1769 (2009) (discussed in Reasons for Denying the Writ § II, infra)

[4]The bulk of the mitigating evidence, including the evidence of Mr Thomas' mental illness and dysfunctional life history, was first presented in the state post-conviction appeal (after undersigned counsel's office entered its appearance) Only positive character evidence was before the state post-conviction trial court Thus, that court did not address most of the mitigation in this case The Pennsylvania Supreme Court did not treat this as a procedural default, so there is no bar against federal review In any event, the Commonwealth does not raise a procedural bar argument

E. The Third Circuit's Reversal of the Grant of Sentencing Relief

The Third Circuit reversed the District Court's grant of sentencing relief The Circuit held that the District Court erred when it granted relief without an evidentiary hearing, and remanded so the District Court can hold such a hearing

1. Standard of review under AEDPA

The Third Circuit first determined the proper standard of review under AEDPA Under settled law, which the Commonwealth does not challenge, the standards of 28 U S C § 2254(d) apply only to claims that were "adjudicated on the merits" in state court, when "the state court has not reached the merits of a claim , the deferential standards provided by [§ 2254(d)] do not apply" Thomas-4, App 9 (citation omitted)

The Third Circuit carefully considered the unusual way in which the state courts dealt with Mr Thomas' arguments about counsel's ineffectiveness at capital sentencing, and found that "*no state court actually decided the claims* that formed the basis of the District Court's decision to grant Thomas habeas relief" Thomas-4, App 35 The Circuit observed that Mr Thomas' ineffectiveness claim includes an argument that counsel was ineffective for failing to reasonably investigate mitigating evidence of Mr Thomas' mental illness and traumatic life history and an argument that counsel failed to professionally advise Mr Thomas about the meaning and nature of mitigation

> Even though Thomas raised these claims during the course of the state court proceedings, no state court actually adjudicated them on their merits The [post-conviction trial] court and the reviewing Pennsylvania Supreme Court declined to reach the merits of each Instead, both courts determined that the claims "have previously been decided by [the Pennsylvania Supreme Court] on direct appeal" Thomas[-2] at 714 & n 3 In reaching that conclusion, both courts were mistaken First, the Pennsylvania Supreme Court could not have addressed Thomas' ineffective assistance [for failing to reasonably investigate mitigating evidence of Mr Thomas' traumatic life history and mental illness] claim on direct appeal because he raised it for the first time in his PCRA petition On direct appeal, the Pennsylvania Supreme Court addressed only one mitigating evidence issue whether Thomas understood that he *could* present mitigating evidence Thomas[-1] at 710 ("Finally, Appellant complains that his trial counsel did not advise him that *he could put on evidence* of mitigating circumstances " (emphasis added)) But Thomas raised a completely different issue he asserted that he did not understand the *nature and*

> *purpose* of mitigating evidence [because counsel failed to reasonably advise him] Therefore, no state court actually decided the claims that formed the basis of the District Court's decision to grant Thomas habeas relief

Thomas-4, App 34-35 (emphasis in Thomas-4)

In short, the Third Circuit found that "an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus *failed to adjudicate that claim on the merits* " Thomas-4, App 36 Because "Thomas raised the claims at issue in state court, [but] the state courts did not reach their merits," there was no state court "adjudication on the merits," and "the deferential standards of [§ 2254(d)] do not apply " Id

2 Merits of the ineffectiveness claim

The Third Circuit applied Strickland v Washington, 466 U S 668 (1984), and its progeny, held that the District Court erred when it granted relief on the current record, and remanded for an evidentiary hearing

a. As to Strickland's "performance" prong, the Third Circuit held that the District Court erred when it found, on the current record, that trial counsel failed to reasonably investigate The Third Circuit held that an evidentiary hearing is required on this issue

The Circuit observed that there is some evidence already of record supporting Mr Thomas' proffer that counsel failed to do any mitigation investigation

First, Mr Thomas provided a declaration from an aunt "that states that no attorney or investigator asked her about Thomas' life and mental health while he was on trial " Thomas-4, App 37 This is "evidence directly pointing to a failure to investigate " Id

Second, when counsel declined to present any evidence at sentencing, he did not make any "proffer identifying the investigative measures he had undertaken, or what evidence he was prepared to present " Thomas-4, App 38 Counsel's failure to make such a proffer is consistent with Mr Thomas' allegation that counsel had not investigated and had nothing prepared Compare Wiggins v Smith, 539 U S 510, 515-16 (2003) ("Before closing arguments, [counsel] made a

proffer to the court, outside the presence of the jury," which "detailed the mitigation case counsel would have presented", counsel's failure to "proffer any evidence of petitioner's life history or family background" supported defendant's allegation that counsel had not reasonably investigated those areas), Schriro v Landrigan, 127 S Ct 1933, 1937 (2007) (counsel made extensive proffer of mitigation evidence he had prepared and would have presented if allowed)

Third, "the state court file, where Thomas' court-appointed counsel and the court would have lodged certain case-related documents, yielded nothing suggesting an investigation – no request for a mitigation investigator, no request for funds for a mitigation investigation, no request for a defense mental health expert, and no subpoenas for mental health records " Thomas-4, App 38 Again, this is consistent with Mr Thomas' proffer that counsel failed to investigate – had "counsel performed any investigation, we would expect either some mention of it in open court or some 'paper trail' suggesting it in the record of proceedings The absence of both implies that counsel did no investigating " Id

While the evidence already of record is *consistent with* and *supports* Mr Thomas' proffer that counsel failed to investigate, the Third Circuit concluded that the current record is too "sparse" to *prove* lack of investigation Thomas-4, App 37

> [F]rom this record, we cannot simply jump to the conclusion that Thomas' counsel was deficient Counsel's performance enjoys a presumption of effectiveness, and we must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct " [Strickland] at 689-90
>
> This means that based on the present record, we cannot affirm the District Court's conclusion that Thomas' counsel was deficient at sentencing
>
> We by no means go so far as to deny Thomas the possibility of relief [W]e believe that any resolution of Thomas' Strickland claims here is premature without the benefit of an evidentiary hearing Accordingly, we will remand the case for a hearing concerning the extent, if any, of Thomas' counsel's pre-sentencing investigative efforts to obtain mitigating evidence

Thomas-4, App 38-39, see also id , App 52 ("[W]e disagree with the District Court that Thomas' sentence should be vacated Although the absence of any evidence of a pre-sentencing investigation in this case seems to suggest that none occurred, it is simply not sufficient to overcome the

presumption of effectiveness that we are bound to apply As a result, we remand the case for an evidentiary hearing concerning the extent, if any, of Thomas' counsel's pre-sentencing investigative efforts to obtain mitigating evidence")

Thus, the Third Circuit concluded, an evidentiary hearing is required in order to determine the actual scope of trial counsel's investigation

b. As to Strickland's "prejudice" prong, the Circuit began its discussion by stating "*without a fully developed record*, we cannot foreclose the possibility that Thomas will be able to show prejudice – a reasonable probability that, but for counsel's deficiency, one juror would have voted to impose a sentence of life imprisonment" Thomas-4, App 41 This speaks to an *evidentiary hearing*, after which both performance *and* prejudice will be assessed on a "fully developed record" Other parts of the Third Circuit's opinion, however, highlighted by the Commonwealth, suggest that the Circuit believed a finding of prejudice is appropriate E g , Petition at 26-31

The Commonwealth's arguments in its certiorari petition, regarding the need for a hearing on prejudice, are quite ironic given the way in which the Commonwealth raised its hearing-on-prejudice assertion in the Third Circuit In the Circuit, the Commonwealth's sole reference to a possible need for a prejudice hearing is in a *footnote on the last page of its 130 page brief* See Second-Step Brief for Appellees/Cross-Appellants Martin Horn, et al , at 130 n 28 ("Further, Thomas's proposed mitigation witnesses have never testified in court under oath and been subject to cross-examination, so their testimony would be likewise required before granting the writ") Under Third Circuit precedent, the Commonwealth may have waived its argument for a hearing on prejudice by confining it to a passing reference in a footnote John Wyeth & Brother Ltd v CIGNA Int'l Corp , 119 F 3d 1070, 1076 n 6 (3d Cir 1997) ("arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived")

In any event, the precise meaning of the Circuit's ruling on prejudice, and the question of

whether the Commonwealth waived any argument for a hearing on prejudice, will be addressed by the District Court on remand

The Third Circuit expressly addressed and rejected the other main arguments made by the Commonwealth about "prejudice"

First, the Circuit rejected the Commonwealth's argument that Mr Thomas was not prejudiced because his mental health records contain some negative information The Circuit recognized that the records documenting Mr Thomas' lifelong history of mental impairments contain some negative descriptions of him, just as the evidence introduced at trial and capital sentencing did See Thomas-4, App 50-51 The Circuit observed, however, that Mr Thomas' lifelong history of mental illness is of substantial mitigating importance precisely because his "mental health history acts as a common thread that ties all of this evidence together" -- it "explain[s] Thomas' horrific actions in way that lower[s] his culpability" by showing that they were the actions of a severely mentally ill child who became a severely mentally ill man, "and thereby diminishe[s] the justification for imposing the death penalty" Id , App 51

Because Mr Thomas' history of mental illness mitigates both the capital crime and Mr Thomas' entire history, the Circuit concluded that "there exists a reasonable probability that effective counsel would have chosen to present evidence of Thomas' mental health history, and that its presentation would have convinced at least one juror to sentence Thomas to life imprisonment" Thomas-4, App 52

Second, the Circuit rejected the Commonwealth's argument that "no prejudice could have resulted because Thomas would not have let his counsel present any mitigating evidence" Thomas-4, App 42 The Commonwealth asserted that its argument was supported by Schriro v Landrigan, 550 U S 465 (2007), and Taylor v Horn, 504 F 3d 416 (3d Cir 2007), which applied Landrigan to deny relief in another Pennsylvania capital case, but the Circuit disagreed The Circuit explained at length why Landrigan and Taylor do not control here

In Landrigan, the Supreme Court confronted "a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." There, the petitioner's counsel informed the trial court that he had advised the petitioner "very strongly" that the petitioner should present mitigating evidence. The trial court questioned the petitioner, and the petitioner confirmed that he instructed his counsel not to present mitigating evidence and that he understood the consequences. When the petitioner's counsel was proffering, at the court's request, the mitigating evidence he intended to present, the petitioner interrupted multiple times to explain away the mitigating characteristics of the evidence, and also to reaffirm that he did not want the evidence presented in court. Finally, at the end of the sentencing hearing, the petitioner stated that "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." Applying AEDPA's deferential standard of review, the Supreme Court determined that the state appellate court reasonably concluded that the petitioner had refused to allow the presentation of mitigating evidence, and this refusal prevented any showing of prejudice.

In Taylor, the petitioner wrote a confession letter to the police, which stated that "I want the maximum sentence." At the petitioner's guilty plea hearing, the petitioner agreed with his counsel's statement that he had instructed counsel not to contact any witnesses or to call any medical personnel who had spoken to him, and that he understood that "the likely result will be imposition of the death penalty." At sentencing, the petitioner informed the court that he declined to present any mitigating evidence. The court then sentenced the petitioner to death. In the subsequent state post-conviction relief proceedings, the state court conducted an evidentiary hearing, denied the petitioner's request for relief, and found that the petitioner had discussed the possibility of presenting testimony of mitigating circumstances with his counsel, that the petitioner rejected the idea of doing so, and that the petitioner personally called potential witnesses to tell them not to attend his sentencing. The state appellate court affirmed these findings and the court's holding.

Applying AEDPA's deferential standard of review, we determined in Taylor that the state post-conviction court's factual and legal conclusions were reasonable. Comparing the petitioner to the one in Landrigan, we agreed with the petitioner that "he was not belligerent and obstructive in court like the defendant in Landrigan," but the record shows that his determination not to present mitigating evidence was just as strong." As a result, "whatever counsel could have uncovered, [the petitioner] would not have permitted any witnesses to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence."

* * *

[B]oth Landrigan and Taylor differ significantly from the present case. As an initial matter, AEDPA deference pursuant to Section 2254(d) constrained federal review in both Landrigan and Taylor. It does not apply here.

Moving to the merits of the Commonwealth's argument, we cannot conclude that Thomas would have interfered with the presentation of all mitigating evidence. Thomas' colloquy at sentencing focused narrowly on whether he wanted to take the stand himself[.] [T]he sentencing court did ask Thomas to confirm that "it's your

decision not to present any evidence" Yet we cannot ignore that this question was part of a compound question that also asked Thomas to reaffirm that "it's your decision not to take the stand," and the remainder of the questions in the colloquy only concerned Thomas' desire to testify on his own behalf Accordingly, Thomas' terse answer to this inquiry does not display an intent to interfere with the presentation of mitigating evidence that is strong enough to preclude a showing of prejudice [T]he only thing that Thomas clearly disclaimed at his colloquy was a desire to testify on his own behalf

The followup questions asked by the [trial prosecutor] fare even worse At most, Thomas' responses indicate that he had no witnesses to call at his sentencing[and] provide[] no support for the Commonwealth's argument that Thomas would have prevented the presentation of all mitigating evidence

Nor does Thomas' refusal to stipulate to his age and education tip the scales in the Commonwealth's favor While Thomas' refusal to stipulate is consistent with the Commonwealth's position, it is equally consistent with other scenarios that the record supports Indeed, Thomas has claimed that he did not understand the nature and purpose of mitigating evidence Thomas' failure to stipulate could be viewed as a symptom of this fundamental misunderstanding, and not as an affirmative declaration against the presentation of all mitigating evidence

In sum, this case bears no resemblance to Landrigan and Taylor Thomas never indicated that he would interfere with or otherwise prevent the presentation of all mitigating evidence, regardless of its nature At sentencing, Thomas' colloquy focused on two very specific questions 1) whether he desired to testify on his own behalf, and 2) whether he had any other witnesses to call That he answered "no" to both does not mean that, had effective counsel prepared mental health evidence, he would have also declined its presentation Therefore, we cannot conclude that Thomas' conduct at sentencing eliminated all possibility that counsel's performance caused him prejudice

Thomas-4, App 43-50 (citations omitted)

In discussing Landrigan, the Circuit emphasized that it did not reach the question reserved in Landrigan of whether a waiver of mitigation must be "informed and knowing," 550 U S at 479

> In assessing Thomas' ability to show prejudice under Strickland, the only question we answer here is whether Thomas would have waived his right to present mitigating evidence had he been represented by effective counsel As a result, we offer no opinion on whether a waiver of the right to present mitigating evidence must be "informed and knowing" See Landrigan, 550 U S at 479

Thomas-4, App 50 n 9

c. The Circuit also observed that the Commonwealth made no effort to argue that trial counsel's closing argument was acceptable under Sixth Amendment standards

> The District Court also determined that counsel's "incoherent" closing argument at sentencing exacerbated the prejudice caused by counsel's other deficient performances Thomas III, 388 F Supp 2d at 511-513 Although we agree with the District Court that "counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment" and that "[c]ounsel wholly failed in his duty to present a closing argument helpful to Thomas," id at 513, it does not appear that the Commonwealth has raised this issue in its cross-appeal Therefore, we will not address counsel's closing argument in our review

Thomas-4, App 7-8 n 2 Thus, trial counsel's harmful closing argument will enter into the District Court's "prejudice" calculus on remand, after the District Court conducts the evidentiary hearing ordered by the Third Circuit

d Finally, the Circuit observed that, "[i]n light of [the District Court's] decision to vacate Thomas' sentence on the basis of Thomas' Strickland claim, the District Court *dismissed, without prejudice*, two of Thomas' other claims" for relief from his death sentence Thomas-4, App 8 n 3 Thus, those two sentencing phase claims also are before the District Court on remand, and will be addressed if Mr Thomas does not prevail, after the hearing, on his ineffectiveness claim [5]

REASONS FOR DENYING THE WRIT

The Commonwealth does not dispute the Third Circuit's holding that counsel's performance was deficient under Strickland, if Mr Thomas' proffer is true, because counsel failed to investigate for mitigation The Commonwealth does not dispute the Third Circuit's holding that an evidentiary hearing is appropriate on the scope of counsel's investigation The Commonwealth does not dispute the Third Circuit's finding that counsel's closing argument at capital sentencing was "at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death " Thomas-4, App 7-8 n 2

All of the Commonwealth's arguments concern Strickland's prejudice prong The Commonwealth's arguments are not appropriate for certiorari review because of the interlocutory

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[5]The Commonwealth agreed that a remand is required on those two claims See Second-Step Brief for Appellees/Cross-Appellants Martin Horn, et al , at 76 n 20 (3d Cir)

nature of the Third Circuit's judgment, which remanded for an evidentiary hearing, because the issues for which the Commonwealth seeks review are not actually presented in this case, and because the issues for which the Commonwealth seeks review concern the Third Circuit's application of settled law to the facts of this case

I THIS COURT SHOULD DENY CERTIORARI BECAUSE OF THE INTERLOCUTORY NATURE OF THE THIRD CIRCUIT'S JUDGMENT, WHICH REMANDED FOR AN EVIDENTIARY HEARING

The Third Circuit did *not* grant relief, nor did it order the District Court to grant relief Instead, it remanded to the District Court for an evidentiary hearing on Mr Thomas' claim that counsel was ineffective at capital sentencing and, if necessary, for consideration of two other sentencing claims that the District Court did not previously address Under these circumstances, where the judgment is interlocutory in nature, this Court generally does not grant certiorari [6] There is no reason to deviate from that general rule here Certiorari should be denied

The Commonwealth, perhaps because it recognizes that certiorari generally is denied under these circumstances, repeatedly asserts (in fact, it emphasizes) that the Third Circuit *granted relief* without requiring a hearing [7] The Commonwealth's assertions are utterly inaccurate, as set forth in

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[6] E g , VMI v United States, 508 U S 946 (1993) (Scalia, J , respecting denial of certiorari) (denying certiorari where Court of Appeals remanded for further proceedings in District Court, "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction " (citing authorities)), Brotherhood of Locomotive Firemen v Bangor & Aroostook R Co , 389 U S 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court The petition for a writ of certiorari is denied ")

[7] E g , Petition at i ("The Third Circuit found that Thomas was prejudiced by the absence of mitigating evidence *even though none of this supposedly favorable evidence has even been subject to a hearing or cross-examination*") (emphasis in Petition), Petition at ii ("I The Court of Appeals improperly granted relief on a claim of ineffectiveness "), Petition at ii ("C The Court of Appeals incorrectly granted relief based on the self-serving statements of Thomas' family members and a hired expert, without even a hearing or cross-examination "), Petition at 11 ("The Third Circuit affirmed the grant of sentencing relief "), Petition at 13 ("The Third Circuit here granted relief to Thomas"), Petition at 14 ("The Court of Appeals even accepted Thomas' evidentiary proffers without so much as a hearing "), Petition at 15 ("**The Court of Appeals improperly granted relief on a claim of ineffectiveness** ") (emphasis in Petition), Petition at 15 ("The Third Circuit held that

the Counterstatement of the Case § E, supra

In the Commonwealth's only nod toward acknowledging that the Circuit actually remanded for an evidentiary hearing, the Commonwealth says the outcome of a hearing "is something of a foregone conclusion, because [trial counsel] has been dead for years, and the Third Circuit has held that the lack of evidence amounts to *proof* that counsel did *no* investigation" Petition at 14 (emphasis in Petition), see also id at 12 (same) The Commonwealth's assertions are again flat out inaccurate

First, the Commonwealth is simply wrong when it claims trial counsel is dead He is very much alive Had the Commonwealth not sought certiorari, he likely would have testified at the hearing by now

Second, the Third Circuit did *not* hold that "lack of evidence amounts to *proof* that counsel did *no* investigation," as the Commonwealth claims Instead, the Circuit simply observed that – because counsel was court-appointed and dependent upon the court for funds – one would expect the state court file to contain at least some hint of counsel's investigation, if counsel did investigate, such as requests by counsel "for a mitigation investigator" or "for funds for a mitigation investigation" or "for a defense mental health expert," or "subpoenas for mental health records" Thomas-4, App 38 The state court file contains none of these things, and the Third Circuit reasonably observed that this absence of any "paper trail" is *evidence supporting* Mr Thomas'

Thomas' trial lawyer was ineffective because he did not develop and present family background and 'mental health' evidence as mitigation"), Petition at 16 ("The Court of Appeals held that the absence of this evidence *prejudiced* Thomas") (emphasis in Petition), Petition at 26 (***"The Court of Appeals incorrectly granted relief based on the self-serving statements of Thomas' family members and a hired expert, without even a hearing or cross-examination.***") (emphasis in Petition), Petition at 26 ("the Third Circuit uncritically accepted all of Thomas' factual proffers at face value – without a hearing [and] without cross-examination"), Petition at 26-27 n 8 (Third Circuit erred because "there can be no relief without a hearing"), Petition at 31 (Third Circuit erred because "there can be no finding of counsel's ineffectiveness without a hearing The next step would be for the defense to actually present its witnesses, and for the prosecution to test the 'mitigation' evidence"), Petition at 33-34 n 10 (Third Circuit erred in making a "decision to grant relief by assuming the truth of Thomas' proffers")

proffer that counsel did not investigate E g , Fed R Ev 803, Note to Paragraph 7 ("Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence ") The Circuit did not hold that the absence of any "paper trail" *proves* lack of investigation, had it so held there would have been no reason to remand for a hearing Rather, it held a hearing is appropriate in these circumstances given Mr Thomas' proffer

In any event, the Commonwealth's speculation about what it fears may happen at the hearing is not grounds for this Court to exercise its certiorari jurisdiction

As to prejudice, the Commonwealth may have waived any argument for a hearing on prejudice by raising it only in a footnote on the last page of its Circuit brief See Counterstatement of the Case § E The precise scope of the hearing ordered by the Third Circuit, and the related issue of the Commonwealth's waiver, are matters for the District Court on remand, not for certiorari [8]

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THIS CASE DOES NOT ACTUALLY PRESENT THE § 2254(d) QUESTION POSED BY PETITIONERS

The Commonwealth seeks review of the following "Question Presented" "Did the Third Circuit unlawfully fail to apply the deference standard [i c , § 2254(d)], where both the Pennsylvania Supreme Court and the state trial court rejected Thomas' ineffectiveness claim on the merits?" Petition at i This case does not actually present this question because, as the Third Circuit explained, *neither the Pennsylvania Supreme Court nor the state trial court addressed Mr Thomas' actual ineffectiveness claim on the merits*

A. The Pennsylvania Supreme Court did not address the merits of this ineffectiveness claim See Counterstatement of the Case § C (describing Pennsylvania Supreme Court rulings)

On direct appeal the Pennsylvania Supreme Court addressed an argument Mr Thomas never

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[8] The Commonwealth attacks Dr Fleming, one of the mental health practitioners who saw Mr Thomas through the years See Petition at 30-31 The Commonwealth did not attack Dr Fleming's credibility in the Third Circuit Dr Fleming is a psychologist who conducted a post-conviction evaluation of Mr Thomas She restated what other doctors have stated over many years, in reports that predate the offense – i e , Mr Thomas is seriously mentally ill See Counterstatement of the Case § B The Commonwealth's attack on Dr Fleming does not help its cause here

actually made – that "counsel did not advise him that he could put on evidence of mitigating circumstances" Thomas-1 at 710 The Court did not address the *actual* direct appeal assertion that counsel led Mr Thomas to believe mitigation was limited to "evidence relating to the circumstances of the offense" Thomas-4, App 33-34 Nor did the Court address Mr Thomas' claims that counsel failed to reasonably investigate mitigating evidence of Mr Thomas' traumatic life history and mental illness and that counsel made a harmful closing argument, because neither of those issues was raised on direct appeal Thus, the Pennsylvania Supreme Court on direct appeal plainly did *not* "adjudicate on the merits" the ineffectiveness issues raised in the federal habeas proceedings

On post-conviction appeal, when Mr Thomas raised all aspects of his ineffectiveness claim, the Pennsylvania Supreme Court denied relief by stating that the claim had "previously been decided by this Court on direct appeal" Thomas-2 at 714 & n 3

In two recent decisions, this Court described the effects this type of state court ruling has on federal habeas review See Cone v Bell, 129 S Ct 1769 (2009), Wellons v Hall, — S Ct —, 2010 WL 154825 (Jan 19, 2010) The Third Circuit treated the Pennsylvania Supreme Court's ruling in *exactly the way this Court held it should be treated* See Thomas-4, App 33-36

First, this Court held that "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already," as the Pennsylvania Supreme Court did on post-conviction appeal here, "it creates *no bar to federal habeas review*" Cone at 1781 (citing Ylst v Nunnemaker, 501 U S 797, 804 n 3 (1991)), Wellons at *1 (quoting Cone) Thus, Mr Thomas' ineffectiveness claim is not procedurally barred

The Third Circuit recognized this, applied the same rule, and held that there was no bar to federal merits review of Mr Thomas' ineffectiveness claim

Second, this Court held that if the claim presented post-conviction *differs* from the earlier claim that the state court previously had addressed, then the state court's post-conviction ruling "did not reach the merits of [the post-conviction] claim" and, thus, "federal habeas review is not subject

to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings' 28 U S C § 2254(d) Instead, the claim is reviewed *de novo* " Cone at 1784

The Third Circuit applied exactly the same rule to Mr Thomas' ineffectiveness claim The Third Circuit observed that Mr Thomas' ineffectiveness claim, presented to the Pennsylvania Supreme Court on post-conviction appeal, is quite distinct from the issue the Pennsylvania Supreme Court addressed on direct appeal, thus, the Pennsylvania Supreme Court "did not reach the merits of [the post-conviction] claim" and "federal habeas review is not subject to the deferential standard" of § 2254(d), but, instead, "the claim is reviewed *de novo* " Cone at 1784

Because the Third Circuit applied the same rules that this Court recently held should be applied, there plainly is no reason to grant certiorari review [9]

B. In the body of the Petition, the Commonwealth asks the Court to review a § 2254(d) question that is quite different from its "Question Presented" – it asks the Court to decide if "the merits decision of a lower [state] court" should be reviewed under § 2254(d) "where the decision was later affirmed by operation of a procedural rule that the federal court considers inadequate " Petition at 34-35, see generally id at 11, 32-39

This issue is not properly before the Court because "it is not 'fairly included' in the questions presented under this Court's Rule 14 1(a) " Wood v Allen, — S Ct —, 2010 WL 173369, *8 (Jan 20, 2009) (§ 2254(d) argument made in body of certiorari petition not properly before the court when not "fairly included in the *questions presented* for our review") (emphasis in Wood)

In any event, the issue the Commonwealth asks this Court to review is not even present in this case As set forth in the Counterstatement of the Case § C, the lower state court did not render a "merits decision" on Mr Thomas' actual ineffectiveness claim, as the Commonwealth claims And

[9] The ruling of the lower state post-conviction court does not change the analysis because that court, too, failed to address the merits of Mr Thomas' actual ineffectiveness claim See Counterstatement of the Case § C (describing lower court ruling)

even if it erroneously is assumed that the lower state court's ruling was on the merits of the actual claim, the Third Circuit did *not* treat the Pennsylvania Supreme Court's ruling as an "inadequate" procedural bar ruling – instead, the Circuit treated the Pennsylvania Supreme Court's ruling in the way this Court held it should be treated in Cone and Wellons, as *not being a bar ruling at all*

The Commonwealth grossly misrepresents the Third Circuit's opinion when it claims the Circuit "found that [the Pennsylvania Supreme Court's post-conviction ruling] was a *procedural* ruling, and it was inadequate to boot " Petition at 33 (emphasis in Petition) (citing Thomas-4, App 18-19 n 4), see also Petition at 11, 32-36, 39 (same argument, citing Thomas-4, App 10-18 & n 4)

The parts of the Third Circuit opinion cited by the Commonwealth *have nothing to do with Mr Thomas's ineffectiveness claim* Instead, that part of the Third Circuit's opinion discusses the procedural and § 2254(d) status of *three other claims*, for which the Pennsylvania Supreme Court *actually did* apply a procedural bar rule on post-conviction appeal [10] It is for those *other* claims, *not Mr Thomas' ineffectiveness claim*, that the Third Circuit applied the default and § 2254(d) analysis on which the Commonwealth seeks this Court's review Since the Third Circuit *denied relief* on those other claims, nothing about the Third Circuit's treatment of those other claims could be before this Court even if the Commonwealth had put it in its "Questions Presented "

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[10] See Thomas-4, App 10 ("We will first address the three claims before us on Thomas' appeal 1) the trial court's 'reasonable doubt' instruction to the jury was unconstitutional, 2) the Commonwealth's closing argument at sentencing was unconstitutional, and Thomas' counsel was ineffective for not objecting to it, and 3) Thomas' counsel was ineffective for failing to life qualify the jury Here, the [lower state post-conviction] court ruled on the merits of two of Thomas' claims – his [prosecutorial] closing argument and life-qualification claims – but did not address the third – his objection to the reasonable doubt instruction On appeal, the Pennsylvania Supreme Court dismissed all three claims as waived because they were not raised in Thomas' amended [post-conviction] petition See Thomas[-2] at 715 n 4 ")

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE PETITION PROVIDES ONLY A PARTY'S DISAGREEMENT WITH THE COURT OF APPEALS' APPLICATIONS OF PROPERLY STATED RULES OF LAW

In light of the above, the Commonwealth's real quarrel with the Third Circuit is that the Circuit concluded Mr Thomas' proffer on prejudice is a valid proffer, while the Commonwealth disagrees Certiorari "is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law " Supreme Court Rule 10 Certiorari should be denied here because the Third Circuit applied "properly stated rule[s] of law" to the facts of this case

A. The Commonwealth combs the Third Circuit's opinion for isolated sound bites which it says suggest the Circuit did not "apply the proper standard" for prejudice Petition at 18, see generally id at 11-12, 18-22 But the Circuit repeatedly stated and applied the proper reasonable-probability-of-a-different-result standard [11] The Commonwealth's attempt to create an issue, where none actually exists, is unavailing Cf Woodford v Visciotti, 537 U S 19, 23-24 (2002) (where court's "opinion painstakingly describes the Strickland ['reasonable probability'] standard," its "occasional shorthand reference to that standard by use of" other phrases "may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision")

B. The Commonwealth complains that the Third Circuit gave a "two-paragraph discussion of prejudice " Petition at 18 But the Circuit actually devoted *eleven* paragraphs to the

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[11] E g , Thomas 4, App 30 ("To demonstrate prejudice, Thomas 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different '") (quoting Strickland), App 32 ("Thomas has demonstrated prejudice if 'there is a reasonable probability that, but for counsel's unprofessional errors ' one juror [would have] voted to impose a sentence of life imprisonment rather than the death penalty ") (quoting Strickland), App 41 ("a reasonable probability that, but for counsel's deficiency, one juror would have voted to impose a sentence of life imprisonment"), App 42 ("a reasonable probability that this evidence would have persuaded at least one juror to impose life imprisonment rather than the death penalty"), App 52 ("a reasonable probability that effective counsel would have chosen to present evidence of Thomas' mental health history, and that its presentation would have convinced at least one juror to sentence Thomas to life imprisonment")

Commonwealth's prejudice arguments, and a twelfth paragraph to the harmful effect of counsel's closing comments, which the Commonwealth did not challenge See Thomas-4, App 7-8 n 2, 42-52 In any event, purported brevity of a lower court ruling is not grounds for granting certiorari

C. The Commonwealth argues that the Third Circuit misapplied Schriro v Landrigan, 550 U S 465 (2007), to this case Petition at 11, 22-26 The Third Circuit carefully considered the Commonwealth's Landrigan arguments, addressed them at length, and found them wanting on this record See Counterstatement of the Case § E The Third Circuit has shown it understands Landrigan, here and in Taylor v Horn, 504 F 3d 416 (3d Cir 2007), where the it applied Landrigan to *deny relief* in a capital case The Commonwealth's disagreement with the Third Circuit's application of settled law to the facts is not grounds for certiorari review

One aspect of the Commonwealth's Landrigan argument may deserve a further, final comment The Commonwealth suggests the Third Circuit imposed an "informed and knowing" requirement on the failure to present mitigating evidence Petition at 11, 24 But the Circuit *expressly explained that it did no such thing* See Thomas-4, App 50 n 9 (quoted in Counterstatement of the Case § E) Again, the Commonwealth seeks review of an issue that is absent from this case

D. The Commonwealth says the Third Circuit erred in assessing prejudice because some of the records documenting Mr Thomas' history of mental illness contain negative information E g , Petition at 11-12, 15-18 The Third Circuit applied settled law, carefully considered the Commonwealth's arguments about this fact-intensive issue, and rejected those arguments The Commonwealth's disagreement with the outcome is not grounds for certiorari review

Moreover, the Commonwealth seriously understates the strength of the mitigating evidence in this case, and ignores the mitigating light the evidence sheds on the offense and on Mr Thomas' entire history, including the prior bad acts that established aggravation in this case and that are mentioned in some of the mental health records

The proffer of mitigating evidence in this case is very substantial Mr Thomas suffers from paranoid schizophrenia and several severe personality disorders These serious mental disturbances are not his fault, they are rooted in abnormal brain structure and traumatic childhood experiences The symptoms of these mental illnesses include delusions, hallucinations, lack of contact with reality, irrational thinking and bizarre behavior These mental disturbances disrupt and distort Mr Thomas' self-perception, his perceptions of others and his perceptions of the world around him They wreak havoc on his ability to control, modulate and understand his emotions, his impulses and his actions They produce psychotic breaks with reality

Moreover, Mr Thomas' *entire life* has been miserably distorted by his mental illness From an early age, he was different from other children His strange behavior, which included seeing and speaking to people who were not there, lack of contact with his surroundings, social isolation and severe mood swings, led his peers to make fun of him and call him "crazy" He also had serious learning problems, struggled with his schoolwork and barely managed to pass

Despite his impoverished childhood in a violent inner-city housing project, he was not a disciplinary problem until he was sixteen years old At age sixteen, however, his mental illness overwhelmed him He suffered a breakdown, he was found mentally disabled, and he was committed to a psychiatric hospital, after a bizarre incident in which he put a broom handle into horses' anuses Hospital evaluators found he lacked insight or understanding as to why he did it They found he had struggled for years to build inner defenses against his mental illness, but those defenses broke down and he lost control over his actions They found he was very remorseful, and could not understand why it happened

These professionals found that Brian's mental illness substantially interfered with his capacity for intellectual and emotional functioning They found he lacked understanding or insight into his mental illness When he was discharged from the hospital, Brian asked for ongoing help, and the doctors found that he (and his family) needed intensive, ongoing psychiatric treatment, which

he never received

Both the timing (age 16) and manifestations of this first mental breakdown are consistent with the onset of his schizophrenia During the years after this first breakdown his mental illness became even more severe

By the time he was eighteen, in 1977, mental health professionals found that he suffered from "*serious mental disturbance*" consistent with "*paranoid schizophrenia*", he was "psychotic", he was "delusional", he suffered from "impaired thinking", he was suspicious and fearful, his behavior and thoughts were "erratic" and "bizarre", he was "los[ing] contact with what was going on around him", he had "little insight" into his illness, his "[c]omprehension and judgment are very limited", he had very poor "social skills", he was emotionally "obsessive and blocked", and, despite his "great efforts of control" and "eager[ness] to do and know what is expected" of him, his psychosis sometimes overwhelms him and causes him to commit sex crimes The doctors found his mental illness was severe and getting worse, and believed he should be *confined "in a secure facility* where his behavior can be closely monitored" and he needed psychiatric treatment

In short, Brian Thomas' life is an example of the "human tragedies of seriously disturbed children," Parham v J R , 442 U S 584, 599 (1979), who become seriously disturbed adults This is substantial mitigation [12]

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[12]The Commonwealth suggests Mr Thomas' mental illness is aggravating, rather than mitigating, because it makes him "dangerous " E g , Petition at 7, 8, 10-11, 15, 18 The Commonwealth is wrong First, "future dangerousness is *not an aggravating circumstance* under Pennsylvania's death penalty statute, and therefore is *not a valid factor* to be considered by the jury " Commonwealth v Marrero, 687 A 2d 1102, 1108 n 19 (Pa 1996) In evaluating prejudice under Strickland, courts cannot assume the sentence is imposed by a "lawless decisionmaker" who would treat dangerousness as aggravating Id , 466 U S at 695 Second, the only alternative to a death sentence in Pennsylvania is life without the possibility of parole Thus, Mr Thomas poses no danger to society if sentenced to life Third, Mr Thomas' records show he functions appropriately in the type of structured, controlled environment to which he would be confined if sentenced to life Thus, he poses no danger in prison, either Finally, the Commonwealth's suggestion that mental illness should be treated as aggravating raises serious constitutional concerns, as this Court recognized in Zant v Stephens, 462 U S 862, 885 (1983) ("constitutionally impermissible" to "attach[] the 'aggravating' label to conduct that actually should militate in favor of a lesser penalty, such as

Moreover, Mr Thomas' lifelong history of mental illness also provides a mitigating explanation for the *aggravating* evidence and for other negative information

The disturbing facts of this offense likely increased the weight the jury gave to the offense-related aggravating circumstances – (d)(6) (rape) and (d)(8) (torture) Jurors who understood Mr Thomas' mental illness would give less weight to this offense-related aggravation because they would see the disturbing facts of the offense as symptomatic of Mr Thomas' *severe mental problems*, rather than evidence that he is the inhumane, evil person portrayed by the prosecutor E g , Penry v Lynaugh, 492 U S 302, 319 (1989) (noting "belief, long held by this society, that defendants who commit criminal acts that are attributable to emotional and mental problems, may be less culpable than defendants who have no such excuse")

For similar reasons, Mr Thomas' history of mental illness undermines the weight of the (d)(9) aggravating circumstance – "significant history of felony convictions" – which was based on a "1978 conviction for felonious aggravated assault and indecent assault on a three-year old" and a "1984 conviction for criminal trespass where Thomas unlawfully entered a neighbor's bedroom " Thomas-4, App 5-6, Thomas-3, App 56 Mr Thomas' history sheds mitigating light on these prior offenses, because it shows they were committed by a severely mentally disturbed person

Mr Thomas' history of serious mental illness also explains negative information in the records in a mitigating way In particular, the records show that the bizarre incident with the horses and both assaults on children, which the Commonwealth particularly emphasizes, occurred when Mr Thomas was a teenager, at the same time when he was being committed for psychiatric treatment and when the mental health professionals who observed him found that he suffered from "*serious mental disturbance*" consistent with "paranoid schizophrenia", that he was "psychotic," "delusional" and "los[ing] contact with what was going on around him", and that he was making "great efforts of control" but was overwhelmed by his illness

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perhaps the defendant's mental illness")

Courts long have recognized that a defendant's mental illness can "totally change the evidentiary picture" at capital sentencing because it "not only can act in mitigation, it also could significantly *weaken the aggravating factors*" Middleton v Dugger, 849 F 2d 491, 495 (11th Cir 1988) (quoting Huckaby v State, 343 So 2d 29 (Fla 1977)) The Third Circuit found that Mr Thomas' mental illness does precisely that – his "mental health history acts as a common thread" that explain his actions at the time of the offense and in the past "in way that lower[s] his culpability" by showing that they were the actions of a severely mentally ill child who became a severely mentally ill man Thomas-4, App 51

This Court recently reached a similar conclusion in Porter v McCollum, 130 S Ct 447 (2009) In Porter, the state courts held Porter was not prejudiced by counsel's failure to present mitigating evidence in Porter's military records because those records contained negative information – that he "went AWOL on more than one occasion" Id at 455 This Court found the state court's no-prejudice ruling "unreasonable" because the "evidence that he was AWOL is consistent with [the post-conviction] theory of mitigation" that his combat experiences caused him serious "mental and emotional" distress Id Porter's mental disturbances cast a mitigating light on the negative information in his records, just as Mr Thomas' mental disturbances cast a mitigating light on the negative information in his records

There is no reason to grant certiorari here

CONCLUSION

For the reasons stated, certiorari should be denied

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Supreme Court, U.S.
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NO. 09-527

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, *et al.*,
Petitioners,

v.

BRIAN THOMAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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ARGUMENT IN REPLY

According to the Court of Appeals, "there exists a reasonable probability" that Thomas' new mental health evidence "would have convinced at least one juror to sentence Thomas to life imprisonment." App. 52. But the evidence, which included earlier incidents where Thomas molested infants and horses, was not mitigating at all, it was *frightening*. *Petition* at 15-16. No competent attorney would have overlooked these risks.

Thomas has no response to this basic point. First, he makes a number of procedural arguments about what the state supreme court did and did not do, hoping to justify *de novo* review. But whatever the standard of review, the Third Circuit's prejudice holding was dramatically wrong. Second, he suggests the Court of Appeals did not actually decide the prejudice issue. *Response* at 20. Not only is this hard to reconcile with the panel's language, but Thomas' lawyers recently represented *exactly the opposite* to the district court See Section 2. This is gamesmanship.

Finally, Thomas deals with the devastating facts simply by *ignoring* the negative evidence. He doesn't discuss the facts of the crime *at all*.

He offers only the most self-serving quotes from various psychiatric reports. As for the awful evidence of Thomas's brutalization of horses with a broom handle, Thomas's present counsel simply accept his own incomprehensible excuse that the whole thing was a mistake, suggested to him by someone else. *Response* at 4.

The jury would not have been so gullible.

1. The Third Circuit failed to adequately weigh the "backfire" risks of Thomas' evidence.

The panel's two-paragraph assessment of the risks posed by Thomas' supposedly mitigating evidence was woefully incomplete. The court concluded by reversing the burden of proof: "we are not convinced that the death penalty was a *fait accompli*." App. 51.

Since the *Petition* was filed, this Court has twice re-emphasized that the "backfire" risks of mitigating evidence *must* be realistically taken into account. See Wong v. Belmontes, 130 S. Ct. 383, 387-88 (Nov. 16, 2009) ("This evidence would have made a difference, but in the wrong direction for Belmontes"); Wood v. Allen, __ U.S. __, 2010 WL 173369, *7 n.3 (Jan. 20, 2010) (prosecution would have responded with testimony about Wood's criminal history).

Thomas does not address these cases. Rather, he insists the panel applied the right standard, and he also claims that the court's consideration of the subject was not short at all – it was 11 paragraphs long, he says, not merely two. *Response* at 31-32. But the additional nine paragraphs were about something different – Thomas' refusal to present mitigating evidence. App. 42-49. *None* of that additional discussion touched on the *content* of the evidence.

As for Thomas' point that the Third Circuit applied the correct standard, *Response* at 31: This is wishful thinking. The Court *reversed* the proper analysis. While the Court of Appeals briefly recited the correct standard, its discussion illustrates the panel's apparent belief that *any* possibility of a different verdict was enough to demonstrate prejudice.[1]

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[1] Without any apparent irony, Thomas cites Woodford v. Visciotti, 537 U.S. 19, 23-24 (2002), for the proposition that appellate courts should not be so quick to condemn stray language used by lower courts. *Response* at 31. This is ironic, because Woodford actually stressed the need for federal courts to be forgiving of *state court* opinions before abandoning the mandatory deference standard. Thomas, of course, is not interested in forgiving interpretation of *state court* opinions. *Response* at 27-30 (offering complex arguments that, despite their plain language, the state courts did not decide his claim).

2. Certiorari is justified at this stage of the litigation.

Thomas says this Court should not grant *certiorari* because the Third Circuit's decision was not a final order. But given the importance of the issues finally resolved by the Court of Appeals, the prospect of a hearing only makes the case for *certiorari* stronger.

This Court certainly has the power to review cases that have not yet become completely final. 28 U.S.C. §1254(1). In particular, this Court has *often* granted review in such cases involving federal review of state criminal convictions, where federalism concerns are clear, and the states' power to supervise their own criminal judgments is placed in jeopardy by ongoing, overly intrusive review. E.g., Schriro v. Landrigan, 127 S. Ct. 1933, 1939 (2007) (*certiorari* granted to review decision of Ninth Circuit to remand case for evidentiary hearing); Bell v. Thompson, 545 U.S. 794 (2005) (*certiorari* granted after case remanded for evidentiary hearing on claim of ineffective assistance); Strickland v. Washington, 466 U.S. 668, 679-80 (1984) (granting certiorari to review ineffectiveness standards after 6th Circuit reversed and remanded for factfinding).

As described in the *Petition*, even apart from the prejudice issue, the Third Circuit made

a number of important errors that will not be rendered moot if the case is left alone. *Petition* at 32-39. In particular, the panel's holding that lower state court opinions are often not entitled to deference has been repeatedly relied upon by other courts in the few months since the opinion below was issued.[2] Thomas does not even engage this important holding.

Thomas suggests that the Third Circuit did *not* finally decide the prejudice issue. *Response* at 20. That is disingenuous, because Thomas' lawyers made exactly the *opposite* representation a few weeks ago before the district court, at a status hearing. Transcript at 10, Thomas v. Horn, No. 00-803 (9/2/09) (counsel for Thomas: "In the opinion itself, they actually twice find that prejudice has been established. ... [T]hat's the direct conclusion of the Court and the scope of the remand stated in those terms by the Court itself").

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[2] Simmons v. Beard, 590 F.3d 223, 233 (3rd Cir. Sep 11, 2009); Boyd v. Waymart, 579 F.3d 330, 334 (3rd Cir. Jul 31, 2009) (*en banc*) (Scirica, C.J., with Ambro, Fuentes, and Fisher, J.J., concurring in judgment); Corredor v. Coleman, 2010 WL 391413, *7+ (E.D.Pa. Jan 26, 2010); Simmons v. DiGuglielmo, 2009 WL 2835261, *6+ (E.D.Pa. Aug 28, 2009); Policastro v. Tenafly Bd. of Educ., 2009 WL 2232525, *6 (D.N.J. Jul 24, 2009); Gooding v. Wynder, 2009 WL 4810587, *6 (M.D.Pa. Dec 09, 2009).

Thomas also argues that the hearing will not be an empty proceeding. He takes issue with the Commonwealth's argument that the Third Circuit considers the lack of evidence as "proof" that no investigation took place. *Response* at 26-27. He insists that if the point had been "proved" there would be no need for a hearing. But "proof" and "proved" mean two different things. The Court of Appeals said quite clearly that the lack of evidence *may be used as proof* that counsel did no investigation. App.38. Thus, if Thomas' current lawyers simply produce no evidence at the remand hearing, their silence will conveniently be taken as evidence that prior counsel did no investigation before trial.

Thomas also makes the startling assertion that his trial lawyer is alive and may testify. Assuming that is true, it only raises a deeper question: where has he been all these years that Thomas has been attacking his conduct? It was Thomas' burden to prove that claim. There is no possible excuse for his failure to make *any* prior proffer about what his lawyer might say. Testimony from trial counsel at this late stage would certainly be barred because Thomas failed to even mention it in state court. See 28 U.S.C. §2254(e)(2). In any event, in light of the passage of time, even the rather shocking appearance of trial counsel is unlikely to uncover any actual proof of what happened 25 years ago.

3. The jury would have been able to consider the damaging aspects of Thomas' supposedly mitigating evidence.

The various mental health reports contain a great deal of *negative* information – that Thomas was dangerous, sadistic, and a serial sexual attacker. Thomas argues, however, that the jury could not lawfully consider this as aggravation. *Response* at 34-35 n.12.

Under Pennsylvania law, however, once Thomas attempted to argue that his character and background were somehow mitigating, these negative conclusions and Thomas' prior bad acts were clearly admissible as rebuttal. See, e.g., Commonwealth v. Peterkin, 649 A.2d 121 (Pa. 1994) ("character and background evidence [introduced as mitigation] are subject to rebuttal with evidence of prior bad acts").

4. Whether the state courts resolved Thomas' ineffectiveness claim on the merits is an issue that is fairly encompassed by the second Question Presented.

The second Question Presented asks this Court to consider whether the Third Circuit "unlawfully failed to apply the deference

standard" where both the state appellate court *and* the state trial court "rejected Thomas' ineffectiveness claim on the merits." *Petition* at 1. In the body of the *Petition*, the Commonwealth explains *why* these were merits decisions (rather than procedural decisions) and thus were owed deference. Thomas argues that this argument somehow goes beyond the issue presented.

Thomas' argument is free of common sense. The question of whether *these* state decisions constituted "adjudications on the merits" is not only encompassed by the Question Presented, it is the *whole point*. The issue certainly meets the standard of Rule 14.1(a), which declares that the Question Presented "is deemed to comprise every subsidiary question fairly included therein." See also Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978) (questions "essential to analysis" of the issue presented are "fairly comprised" by the issue presented).

5. The state courts' rejection of the ineffectiveness/mitigation claim is due deference.

Despite Thomas' insistence that the state courts did not decide some of his claims, or decided the wrong claims, the procedural maze he constructs cannot change the issue. The state courts were *clear* that, in their view, none of Thomas' piled-on allegations overcame his flat

refusal to allow any mitigation. The only question is whether this was a reasonable application of the law.

a. The state courts identified the correct claim, and rejected it on the merits.

Thomas attempts to avoid deferential review by arguing that the rejection of his ineffectiveness claim by the Pennsylvania Supreme Court was "neither a procedural bar ruling nor a merits ruling." *Response* at 13 n.3.

There is no third category: the state courts rejected the ineffectiveness claim on the merits, or on procedural grounds. If it was a merits ruling, Thomas must demonstrate that it was unreasonable; if it was a procedural decision, Thomas must show that it was unworthy of respect in federal court.

The correct view is that the state courts rejected Thomas' ineffectiveness claim on the merits, repeatedly. *First*, Thomas argued on direct appeal that his lawyer should have presented mitigating testimony from family members. The state supreme court rejected this claim, because – unmentioned by Thomas at the time – he had *refused* to allow *any* mitigating evidence. Commonwealth v. Thomas, 561 A.2d 699, 710 (Pa. 1989) That is a merits decision which stands unless reasonable – a difficult

showing, given this Court's decision in Schriro, 127 S. Ct. at 1939.

Next, Thomas argued on collateral review that with better advice, he would not have refused to present mitigating evidence. But the underlying factual allegations were exactly the same. The state trial court held, correctly, that the core of this issue had been previously litigated – that is, the state supreme court had already held that Thomas' refusal to present mitigating evidence defeated a claim of ineffectiveness. App. 121-22. In the alternative, the trial court found that Thomas' "mitigating" evidence would not have changed the verdict anyway. App. 122-23. Under Cone v. Bell, 129 S. Ct. 1769, 1780 (2009), the "previous litigation" ruling was a *merits* decision to which AEDPA applies. The alternative "no prejudice" ruling was *also* plainly a merits ruling.

Finally, on appeal from the denial of collateral review, Thomas made a similar claim, but for the first time he claimed mental illness as a mitigating circumstance. The state supreme court, however, agreed with the lower court, that the Court's conclusion on direct appeal – counsel could not be ineffective because Thomas refused to present any evidence of mitigation – was still just as valid as ever. Commonwealth v. Thomas, 744 A.2d 713, 714 n.3 (Pa. 2000). Again, under

Cone, this was a merits ruling, to which deference applies.

Thomas, however, insists that the state supreme court decided the *wrong claim*. Thomas says that his *real* claim on direct appeal was that counsel didn't tell him that mitigation evidence could be *unrelated to the crime*, while the state Court phrased the allegation as being that counsel did not tell him about the availability of mitigating evidence *at all*. *Response* at 28. But the state supreme court was clearly referring to the claim in shorthand – there was no dispute that Thomas knew he could present mitigation evidence and that he refused. It was for that reason the state supreme court denied the claim.[3]

On appeal from the denial of collateral review, Thomas argued again that his counsel was ineffective for not presenting mitigating evidence. The state supreme court held that

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[3] Thomas insists that the Third Circuit took no position on whether a defendant's refusal to present mitigating evidence must be knowing and voluntary. *Response* at 32; App. 50 n.9. That is what the panel said, but it makes little sense. The panel (and Thomas) fault the state court for *not* considering whether Thomas truly "understood" what he was doing, and indeed that seems to be the entire basis for *de novo* review (because the state courts did not consider this argument), as well as for distinguishing Schriro. App.35.

more allegations about mitigation that his lawyer should have presented, were encompassed by Thomas' refusal to allow *any* mitigation. 744 A.2d at 714 n.3.

b. The Pennsylvania Supreme Court's decision on collateral review was substantive, not procedural.

The Third Circuit also held that the Pennsylvania Supreme Court "declined to reach the merits" of the ineffectiveness claim, by rejecting it as "previously ... decided." App.34. If it was not a merits decision, then it was a procedural decision, which did not trigger the deference standard. The panel went on to explain its view that the state supreme court's decision on direct appeal did *not* encompass the later ineffectiveness claim; the end result, the panel concluded, was "*de novo*" review. App. 35-36.

Under Cone, however, a finding of "previous litigation" is a merits decision, so the federal courts are limited to one question: was this an *unreasonable* decision? In other words, was it unreasonable for the state court to hold that Thomas' refusal to allow any mitigating

evidence controlled these related ineffectiveness claims?[4]

These procedural issues may seem complicated, but it all boils down to this: The state court said it was deciding the ineffectiveness claim on the merits. If Thomas disagrees with the outcome, that claim is governed by the mandatory deference standard.

6. The Commonwealth does not concede everything but prejudice.

According to Thomas, the Commonwealth *agrees* that his lawyer acted unreasonably – that is, if his proffers are true. *Response* at 24-25. Obviously, the Commonwealth does not concede that his proffers are true. To the extent Thomas means to suggest that the Commonwealth's

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[4] Thomas argues that the Court of Appeals did exactly what this Court did in Cone, but that is not so. There were two relevant holdings in Cone: (1) the "previous litigation" bar amounted to a merits ruling; and (2) the state court made a simple mistake, because the particular claim of prosecutor misconduct had not been earlier addressed. 129 S. Ct. at 1780. Here, there is no such simple factual mistake. There is only an alleged *legal* mistake, that is, the state supreme court believed that Thomas' refusal to allow any mitigation evidence encompassed his later claim, while Thomas disagrees. That *legal* dispute is subject to deference review.

arguments are *only* relevant to prejudice (rather than whether counsel's actions were reasonable), this is not so. If particular "mitigating" evidence is not believable, or it is risky, or it contradicts what is before counsel's own eyes, then counsel may reasonably choose not to pursue it.

7. The Commonwealth has not somehow waived its right to a hearing.

The Third Circuit was wrong to find that Thomas had established prejudice without at least a hearing. But Thomas argues that the Commonwealth "waived" its right to a hearing by not asking for one in the Third Circuit. *Response* at 20, 27. That is a remarkable argument: When the State argues that habeas relief should be *denied* without a hearing, it does not thereby agree that relief can be *granted* without a hearing. It is the same principle that governs any garden-variety motion to dismiss – if the motion is denied, the moving party has not given up its right to a trial.

CONCLUSION

For the reasons set forth above, and in the *Petition for Writ of Certiorari*, petitioners request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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